UNITED STATES DEPARTMENT OF THE INTERIOR

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Secretary of the Interior -- William Clark

Office of Hearings and Appeals -- Paul Baird

Office of the Solicitor -- Frank Richardson

INDEX-DIGEST

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This index-digest covers all published and important unpublished decisions and opinions of the Department of the Interior for the period from January 1 through September 30, 1984, rendered in the Office of Hearings and Appeals, Ballston Towers, Building No. 3, 4015 Wilson Boulevard, Arlington, VA 22203, and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

Decisions and opinions cited as appearing in 91 I.D. are published and copies may be obtained by subscription from the Superintendent of Documents, U. S. Government Printing Office, Washington, D.C. 20402. Other decisions and opinions are unpublished and copies may be obtained from the Office of Hearings and Appeals or the Office of the Solicitor as provided in 43 CFR Part 2.

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CONTENTS

Page(s)

SYMBOLS

ANCAB - Alaska Native Claims Appeals Board
IA-T - Indian Appeals--Tort
IBCA - Interior Board of Contract Appeals
IBIA - Interior Board of Indian Appeals
IBLA - Interior Board of Land Appeals
IBSMA - Interior Board of Surface Mining Appeals
M - Solicitor's Opinion
OHA - Office of Hearings and Appeals
SEC - Office of the Secretary

ACCOUNTS

FEES AND COMMISSIONS

Under 43 CFR 3112.2-2(c) (1982), BLM properly disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition of further participation in the simultaneous leasing program.

Terrance Gillian, 79 IBLA 105 (Feb. 17, 1984)

MFL Partnership, Main Street Federal Energy Co., 82 IBLA 75 (July 17, 1984)

Under 43 CFR 3112.2-2 (1982), BLM properly disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition for further participation in the simultaneous leasing program even where an applicant substitutes a collectible remittance after the filing period but prior to the simultaneous oil and gas lease drawing.

Charles R. Brucks, Jr., 80 IBLA 190 (Apr. 20, 1984)

Under 43 CFR 3112.2-2 (1982), it is proper for BLM to disqualify simultaneous oil and gas lease applications submitted with uncollectible filing fees and require payment of the debt as a condition for further participation in the simultaneous leasing program, even where an applicant substitutes a collectible remittance after the filing period.

Satish K. Arora, 80 IBLA 271 (May 4, 1984)

ACCRETION

Where riparian public land has been completely eroded away by the actions of a navigable river, title is lost to the United States and, where said land is subsequently restored through accretion by the continued action of the river, title belongs to the riparian owner.

David L. Provines, 81 IBLA 148 (May 31, 1984)

It is a general rule that a meander line is not a line of boundary but designed to point out the sinuosity of the bank or shore and is a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the waterline itself. The "Basset exception" to this rule is that if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within the meander line. In determining the applicability of the "Basset exception," consideration must also be given to equitable factors, including unjust enrichment.

Silas L. B. Johnson, Marilyn Johnson, 82 IBLA 135 (July 27, 1984)

ACT OF FEBRUARY 14, 1859

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new

ACT OF FEBRUARY 14, 1859--Continued

townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

State of Oregon et al., IV, 80 IBLA 354 (May 10, 1984) 91 I.D. 212

ACT OF FEBRUARY 28, 1891

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for unsurveyed school sections within a national forest shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of secs. 16 and 36 therein. Where a protraction on which the state relies to make its indemnity selections reveals that a fractional township is present, the state's entitlement to indemnity lands is calculated according to the pro rata rule set forth at 43 U.S.C. § 852 (1976).

Where a survey on which the state relies to make its indemnity selections pursuant to the Act of Feb. 28, 1891, reveals a fractional township with a school section in place, the state's entitlement should be in an amount equal to the acreage shown by the surveyed school section or in an amount determined by the pro rata rule at the election of the state.

Until a survey of public lands has been run and approved, the designated sections of a township are undefined and the lands are unidentified.

Where the State of Oregon makes an initial selection of indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed fractional township in a national forest, it is not entitled to additional indemnity lands should a subsequent reprotraction or survey be made of the township.

State of Oregon et al., IV, 80 IBLA 354 (May 10, 1984) 91 I.D. 212

ACT OF JUNE 4, 1897

Where a deed embracing certain base lands is tendered to the United States in an application for an exchange under the Forest Lieu Exchange Act, Act of June 4, 1897, 30 Stat. 11, which title is based on a deed issued for state school lands to a fictitious individual, such deed vests no title in the United States. Where, however, the state deed is issued to a real person, even though it may have been fraudulently obtained from the state, acceptance by the United States of the exchange application is sufficient to vest title in the United States to the base property, even though that title might be subject to defeasance in a proper proceeding.

Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 11, title to the base property vested in the United States. Such title was not divested by either the subsequent refusal of the United States to complete the exchange or by the acquisition of the selection rights emanating from the acceptance of the application by a third-party which had been defrauded of the base lands through the actions of the original applicant.

Where the United States had accepted an application for a forest lieu exchange under the provisions of

ACT OF JUNE 4, 1897--Continued

the Act of June 4, 1897, 30 Stat. 11, which application was based on base lands fraudulently secured from a state, and the state subsequently obtained a quitclaim from the applicant of all his interest in the lands, the state did not regain title to the base lands but rather was vested with all selection rights which had properly appertained to the exchange application.

Where the record establishes that, but for the actions of the Department in improperly approving an exchange, a state would have properly exercised its exchange rights pursuant to applicable law, the Department will be estopped from subsequently asserting the exchange was improper where, as here, it would no longer be possible for the state to exercise its exchange rights.

Under the United States Supreme Court's decision in Wyoming v. United States, 255 U.S. 489 (1921), an application for a forest lieu exchange was accepted by the filing of a proper exchange and the acceptability of an exchange was to be judged with reference to the facts existing at the time of filing. The actual acceptance of an exchange application, however, even if based on a misapprehension of the facts, vested title to the offered lands in the United States.

The classification of land as Supplement A, B, or C, by the Oregon Supreme Court in State v. Hyde, 88 Or. 1, 169 P. 757 (1918), is not binding on the United States as to the factual predicates thereof, particularly as the United States was not a party to the case.

When a state obtained a quitclaim deed from a forest lieu applicant whose application had been accepted by the United States, the state merely acquired the same rights to complete the selection which were possessed by the original applicant. Where the state failed to record this forest lieu selection right under the Act of Aug. 5, 1955, 69 Stat. 534, or tender such right for payment under the Act of July 6, 1960, 74 Stat. 334, all rights flowing from the forest lieu selection right to either complete an exchange or have the base property reconveyed terminated.

While it is a general rule that adverse possession does not run against a state, this rule does not apply as against the United States. Where the United States has maintained open and notorious possession of certain parcels of land for over 80 years, the United States has acquired title to those parcels through adverse possession even though the record title holder was a state.

State of Oregon et al., I, 78 IBLA 255 (Jan. 10, 1984)
91 I.D. 14

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Inyo National Forest pursuant to sec. 315 of the Act of Oct. 21, 1976, which parcel was deeded to the Government in 1899 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land to the United States as part of the national forest in which the lands are located.

Andy D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

ACT OF JUNE 25, 1910

When an application is made for an allotment under the provisions of 25 U.S.C. § 337 (1976), governing allotments to Indians within national forests, the application is referred to the Secretary of Agriculture for a determination whether the lands are more valuable for agricultural or grazing purposes than for the timber found thereon. The Department of the Interior

ACT OF JUNE 25, 1910--Continued

is bound by the determination of the Secretary of Agriculture and is constrained to follow that decision.

Warren J. Conrad, 79 IBLA 394 (Mar. 27, 1984)

ACT OF DECEMBER 29, 1916

A decision approving a bond filed by a locator of mining claims for reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed in the absence of a showing that the amount of the bond is inadequate to cover damage to crops, improvements, and the value of the land for grazing purposes.

Robert E. Michael et ux., 79 IBLA 255 (Mar. 5, 1984)

ACT OF MAY 29, 1928

A mining claim located at a time the land is withdrawn from appropriation by the Act of May 29, 1928, is null and void ab initio. It is immaterial whether future revocation of the withdrawal is being considered.

Samuel P. Spoerstra, 78 IBLA 383 (Jan. 24, 1984)

ACT OF JULY 6, 1960

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Inyo National Forest pursuant to sec. 315 of the Act of Oct. 21, 1976, which parcel was deeded to the Government in 1899 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land to the United States as part of the national forest in which the lands are located.

Andy D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

ACT OF OCTOBER 8, 1964

BLM may properly declare lode mining claims located wholly on land within the Lake Mead National Recreation Area, established pursuant to the Act of Oct. 8, 1964, 16 U.S.C. § 460n (1982), null and void ab initio because such land is implicitly withdrawn from mineral entry.

Marvin F. Johnston, 81 IBLA 295 (June 12, 1984)

ACT OF OCTOBER 15, 1966

Where the record reflects that the BLM decision not to do class III onsite cultural resource studies on the timber sale units was made without the consultation process as required by 36 CFR 800.4(a)(1), BLM will be required to so consult and to take whatever further

ACT OF OCTOBER 15, 1966--Continued

action is required as a result of the consultation process prior to any entry by the timber purchaser.

Curtis Mitchell & STAND, 82 IBLA 275 (Aug. 31, 1984)

ACT OF OCTOBER 21, 1976

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Inyo National Forest pursuant to sec. 315 of the Act of Oct. 21, 1976, which parcel was deeded to the Government in 1899 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lien selection was never consummated, because the Act of July 6, 1960, quieted title to such land to the United States as part of the national forest in which the lands are located.

Andy D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

ADMINISTRATIVE AUTHORITY

GENERALLY

A decision of the Bureau of Indian Affairs that cancels a lease of Indian trust lands generally involves an interpretation of the lease provisions, relevant Federal regulations governing cancellation procedures, and applicable Federal, State, and tribal case and statutory law. Such a decision cannot properly be characterized under 25 CFR 2.19 as solely discretionary.

Clayton J. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984) 91 I.D. 43

The Department of the Interior, as an agency of the executive branch of Government, is without authority to waive requirements imposed by statute.

Jerald A. Waters, 78 IBLA 387 (Jan. 31, 1984)

Reliance on erroneous or incomplete information provided by Federal employees cannot create any rights not authorized by law.

Harriet C. Shaffel, 79 IBLA 228 (Feb. 29, 1984)

A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984) 91 I.D. 165

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Andy D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

ADMINISTRATIVE AUTHORITY--Continued

ESTOPPEL

The erroneous opinion or information of a Federal officer, agent or employee cannot operate to vest any right not authorized by law.

Lamar S. Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

LACHES

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Lone Star Steel Co., 79 IBLA 345 (Mar. 22, 1984)

Viking Resources Corp., 80 IBLA 245 (Apr. 30, 1984)

ADMINISTRATIVE PRACTICE

In a mining contest initiated by the United States, there is no requirement that the contestee offer evidence concerning matters not placed in issue by the United States. Where the Administrative Law Judge incorrectly states a contrary rule, but in practice applies the correct standard, his decision is affirmed.

In a mining contest initiated by the United States where the Government mineral examiners testify they have examined the mineral claims at issue and found no evidence of mineralization to support a discovery, a prima facie case for the Government is established. This showing is not overcome by evidence of ore sample values offered by contestee to show mineralization, where contestee fails to show from which, of 10 claims at issue, the samples were taken.

Cactus Mines Ltd., 79 IBLA 20 (Feb. 3, 1984)

Where BLM uses a computerized economic analysis to justify rejection of a desert land entry application, BLM must explain the basis of its analysis and the deficiencies of the applicant's proposal in its decision so that the applicant has some basis for understanding and accepting the rejection or appealing and disputing it. Sufficient facts and explanations to support the decision must be present before the Board will affirm such a decision on appeal.

David V. Udy, 81 IBLA 58 (May 22, 1984)

Where a simultaneous oil and gas lease applicant, whose application has been rejected because it covers land within a known geologic structure, submits probative evidence contravening the determination that the land is presumptively productive of oil and gas, which is not fully rebutted, but where, nonetheless, questions of fact remain unresolved by the record, a hearing is appropriate to establish a sufficient record to permit decision.

Floyd Chemical Sales, Inc., 82 IBLA 182 (Aug. 13, 1984)

ADMINISTRATIVE PROCEDURE

GENERALLY

An organization appealing a Bureau of Land Management decision will be considered a "party to a case" having standing to appeal an adverse decision of an officer of the Bureau of Land Management where the organization uses the lands in question and actively and extensively participates in the formulation of land use plans for the lands in question.

Desert Survivors, 89 IBLA 111 (Apr. 3, 1984)

ADJUDICATION

Under 5 U.S.C. § 504 (1982) and 43 CFR 4.603, 48 FR 17596 (Apr. 25, 1983), an adversary adjudication is one required by statute to be conducted by the Secretary under 5 U.S.C. § 554 (1982). Because there is no statutory requirement that a mining claim contest be conducted under 5 U.S.C. § 554 (1982), mining claim contests are not proceedings covered by Equal Access to Justice Act.

Kaycee Bentonite Corp., 79 IBLA 182 (Feb. 28, 1984)
91 I.D. 138

Where an applicant for a trade and manufacturing site alleges that she timely mailed a notice of appeal of a decision setting forth estimated cost of survey but there is no evidence to indicate that it was ever received by the proper Bureau of Land Management office, the applicant must bear the consequences.

Donna J. Waidtlow, 82 IBLA 247 (Aug. 28, 1984)

ADMINISTRATIVE LAW JUDGES

Although unorthodox methods of conducting hearings in Indian probate proceedings are not encouraged, when circumstances beyond the control of the parties or Judge necessitate unusual procedures, the Administrative Law Judge bears an additional responsibility to ensure that all parties are fully heard and that the Department's trust responsibility is properly discharged.

Estate of Jesse Paynee, 12 IBIA 277 (June 11, 1984)

ADMINISTRATIVE PROCEDURE ACT

Under 5 U.S.C. § 504 (1982) and 43 CFR 4.603, 48 FR 17596 (Apr. 25, 1983), an adversary adjudication is one required by statute to be conducted by the Secretary under 5 U.S.C. § 554 (1982). Because there is no statutory requirement that a mining claim contest be conducted under 5 U.S.C. § 554 (1982), mining claim contests are not proceedings covered by Equal Access to Justice Act.

Kaycee Bentonite Corp., 79 IBLA 182 (Feb. 28, 1984)
91 I.D. 138

ADMINISTRATIVE RECORD

When new procedural requirements are imposed during the pendency of an appeal which render the administrative record previously prepared by the Bureau of Indian Affairs insufficient for full administrative review, the Board of Indian Appeals will give the Bureau an opportunity to supplement the record and to

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

demonstrate, if possible, that all substantive requirements were met.

Cheyenne & Arapaho Tribes of Western Oklahoma v. Deputy Ass't Secretary--Indian Affairs (Operations), Reading & Bates Petroleum Co., & Woods Petroleum Corp. (On Reconsideration), 12 IBIA 241 (May 18, 1984) 91 I.D. 229

ADMINISTRATIVE REVIEW

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

A decision by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 that is not timely appealed to the Board of Indian Appeals is final for the Department.

25 CFR 2.19 contemplates that, within 30 days after an appeal taken to the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 becomes ripe for decision, the appeal will either be decided by a written decision or referred to the Board of Indian Appeals for decision.

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, motion to assume jurisdiction, or other document alleging Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to invoke the Board's jurisdiction automatically after the expiration of the time period.

Clayton J. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984)
91 I.D. 43

Where the Bureau of Land Management assesses the cumulative impacts of approving multiple permits to drill for oil and gas in a wilderness study area and wild horse range and makes an area-wide determination to permit such oil and gas development because it would have no significant effect on the area, an appeal of that determination challenging the adequacy of the environmental assessment of the cumulative impacts is not premature.

Animal Protection Institute of America, Sierra Club, Colorado Open Space Council, 79 IBLA 94 (Feb. 17, 1984)
91 I.D. 115

Where a counsel moves to reopen a Board decision and the motion is granted, and the parties are given a period substantially in excess of the time requested in which to submit additional evidence but both fail to

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

A locator may not locate a claim with a discovery on patented or withdrawn lands because such lands are not open to the operation of the mining laws. In such cases the claim is void ab initio.

A withdrawal from the operation of the general mining laws does not deprive a claimant of the right to exercise extralateral rights within the withdrawn lands if those extralateral rights are derived from ownership of valid lode mining claims located prior to the withdrawal. The ownership of ores and minerals by virtue of extralateral rights stemming from valid lode mining claims located prior to withdrawal is not divested by the withdrawal.

Anthony Juskiewicz, 79 IBLA 267 (Mar. 7, 1984)

The Act of May 23, 1908, 35 Stat. 267, as amended, 16 U.S.C. § 671 (1976), providing for the establishment of the National Bison Range, terminated the status of the land included therein as land reserved for Indian use.

Hinzeline Overthrust Oil & Gas, Inc., 80 IBLA 4 (Mar. 27, 1984)

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws, including the mining laws, to the extent specified in the notice.

A placer claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio.

John C. Weill, 80 IBLA 39 (Mar. 28, 1984)

A mining claim located upon lands withdrawn from mineral entry by a Secretarial order for the benefit of the Mission Indians is properly declared null and void ab initio.

Robert E. Dawson, Kenneth E. Dawson, 80 IBLA 99 (Apr. 3, 1984)

Mining claims located on lands that are withdrawn from location are null and void ab initio.

Howard J. Hunt, Howard M. Hunt, 80 IBLA 396 (May 14, 1984)

Mining claims located for trace minerals on land previously withdrawn from mineral entry by Exec. Order No. 5327, as to nonmetalliferous minerals, and Public Land Order No. 4522, as to metalliferous minerals, are properly declared null and void ab initio.

Mineral Life Corp., 81 IBLA 103 (May 30, 1984)

Where a lode mining claim is located partially on withdrawn lands, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the withdrawn lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Marvin F. Johnston, 81 IBLA 295 (June 12, 1984)

Where land included in a homestead entry is described among lands withdrawn subject to valid existing rights, the withdrawal attaches to the land upon cancellation of the entry.

Nick P. Panagiotoff, State of Alaska, 81 IBLA 303 (June 15, 1984)

"Reserved," "set apart," "withdrawn." Lands which are "reserved" and "set apart" for the protection and preservation of wildlife pursuant to the Migratory Bird Conservation Act of 1929, as amended, are "withdrawn" for the protection of all species of wildlife within the meaning of 43 CFR 3101.3-3(a)(1).

Richard F. Price, Jr., 82 IBLA 257 (Aug. 29, 1984)

POWERSITES

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and remanded for appropriate action.

Lamar & Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a power project is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1976), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

J. W. Roberts, Joan Roberts, 79 IBLA 279 (Mar. 16, 1984)

Where Congress has provided in 16 U.S.C. § 818 (1982) that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to sec. 16 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1615 (1976), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

REVOCATION AND RESTORATION

A mining claim located at a time the land is withdrawn from appropriation by the Act of May 29, 1928, is null and void ab initio. It is immaterial whether future revocation of the withdrawal is being considered.

Samuel P. Speerstra, 78 IBLA 343 (Jan. 24, 1984)

WORDS AND PHRASES

"Last address of record." Where 43 CFR 1810.2 requires the Bureau of Land Management to deliver communications by mail to the last address of record, such address is the most recent one provided for the case file by the lessee with the declared intent that all required communications be delivered there. Where a party has not so specified, the appearance of a different return address on an envelope or rental payment check received by the Bureau of Land Management does not constitute a change of the address of record.

Arthur M. Solender, Lynn Devereaux, 79 IBLA 70 (Feb. 13, 1984)

"Prevents automated processing." As used in 43 CFR 3112.3(a)(2), 49 FR 2113 (Jan. 18, 1984), an application form is prepared in a manner that "prevents automated processing" where a mistake or omission prevents the computer from fully completing the automated program. An application containing such a deficiency is properly held to be "unacceptable."

Shar Resources, Inc., 79 IBLA 153 (Feb. 24, 1984) 91 I.D. 122

"Federal installation." The Beaver Falls Hydroelectric Power Project, which is operated by Ketchikan Public Utilities, a nonprofit division of the municipality of Ketchikan, pursuant to a license issued by the Federal Power Commission, is not a "Federal installation" and, therefore, the land occupied by the project is not being used in connection with the administration of any "Federal installation" within the meaning of 43 U.S.C. § 1602(a) (1976).

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

"Last address of record." For the purposes of 43 CFR 1810.2(b), in the context of BLM's processing of a lease application, the address stated on the application is to be used as the "last address of record" unless the applicant has filed written notice of a change of address with the BLM office where the application was filed.

Victor M. Dodt, Jr., 81 IBLA 144 (May 31, 1984)

"Reserved," "set apart," "withdrawn." Lands which are "reserved" and "set apart" for the protection and preservation of wildlife pursuant to the Migratory Bird Conservation Act of 1929, as amended, are "withdrawn" for the protection of all species of wildlife within the meaning of 43 CFR 3101.3-3(a)(1).

Richard E. Prince, Jr., 82 IBLA 257 (Aug. 29, 1984)

The phrase "any legal subdivision" in 43 CFR 3108.1 permitting relinquishment of an oil and gas lease or any legal subdivision thereof is not limited in meaning to whole sections for lands shown on a protracted survey.

James M. Chudnow, 82 IBLA 262 (Aug. 29, 1984)

"Proprietary information." Proprietary information means information which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would

WORDS AND PHRASES--Continued

inhibit the Government's ability to obtain this type of information in the future resulting in a substantial detrimental effect on a Government program. Internally generated Governmental conclusions and information are not generally proprietary.

Craig Folson, 82 IBLA 294 (Aug. 31, 1984)

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ADMINISTRATIVE PROCEDURES--Continued

ADMINISTRATIVE REVIEW--Continued

do so, the Board is entitled to dispose of the case by a summary affirmation of the original decision.

Jean Rodgers et al. (On Reconsideration), 5 OHA 266 (Feb. 24, 1984)

If an assignment is approved by BLM after BLM has received notice that a private dispute exists as to the validity or effect of the assignment, but before resolution of the private dispute, fairness dictates that the assignment be vacated to restore status quo pending resolution of the dispute.

Charles W. Dorman et al. (Appellants), Robert L. Mayer, Roger H. Bassey (Appellees), 79 IBLA 209 (Feb. 28, 1984)

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Upon the expiration of the 30-day time period for decision established in 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, motion to assume jurisdiction, or other document alleging Board jurisdiction.

Oliver Redfield v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 190 (Mar. 2, 1984)

A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

Utah Wilderness Ass'n, 80 IBLA 68 (Mar. 30, 1984)
91 I.D. 165

When the record accompanying a decision by the Office of Surface Mining Reclamation and Enforcement responding to a citizen complaint filed pursuant to 30 CFR 721.13 provides no information upon which an objective, independent review of the basis for the decision can be conducted by the Board, the decision will be set aside and the case remanded for further consideration.

Fred D. Terfoss et ux., 81 IBLA 14 (May 14, 1984)

When new procedural requirements are imposed during the pendency of an appeal which render the administrative record previously prepared by the Bureau of Indian Affairs insufficient for full administrative review, the Board of Indian Appeals will give the Bureau an opportunity to supplement the record and to

ADMINISTRATIVE PROCEDURES--Continued

ADMINISTRATIVE REVIEW--Continued

demonstrate, if possible, that all substantive requirements were met.

Cheyenne & Arapaho Tribes of Western Oklahoma v. Deputy Ass't Secretary--Indian Affairs (Operations), Reading & Bates Petroleum Co., & Woods Petroleum Corp. (On Reconsideration), 12 IBIA 241 (May 18, 1984) 91 I.D. 229

Where the resolution of an appeal depends on the determination of disputed issues of fact, the Board of Land Appeals will often refer the case for an evidentiary hearing on the record before an administrative law judge. However, when the administrative record appears to include nearly all of the available evidence, and affords an adequate basis for decision, and other circumstances indicate that an oral hearing would be unlikely to contribute substantially to the existing record, the Board may determine the facts and decide the appeal on the basis of the record before it.

State of Alaska, Mary Frances DeHart, 82 IBLA 165 (Aug. 6, 1984)

To the extent a management plan decision for the Yaquina Head Outstanding Natural Area is the final implementation decision on certain actions, it is a decision appealable to the Board of Land Appeals under 43 CFR Part 4.

Oregon Shores Conservation Coalition, Bruce Waugh, 83 IBLA 1 (Sept. 17, 1984)

BURDEN OF PROOF

In an appeal from a timely protest to the acceptance of a dependent resurvey, the protestant has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. Failure to meet that burden will result in the affirmation of the decision dismissing the protest.

Jean Eli, 78 IBLA 374 (Jan. 30, 1984)

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. Where BLM finds that site easements are not necessary to accommodate existing patterns of travel and an appealing party fails to show otherwise, the BLM decision will ordinarily be affirmed. Where BLM's decision rests on an assumption which is not supported by facts of record, it must be set aside for the record to be supplemented.

State of Alaska, 78 IBLA 390 (Jan. 31, 1984)

A presumption of regularity supports the official acts of public officers and absent clear evidence to the contrary, it will be presumed that they have properly discharged their official duties. Suggestion that BLM may not have investigated a mining claimant's good faith in locating a claim which includes a water source is insufficient to rebut the presumption of regularity.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

Under the provisions of 43 CFR 4.242(b), the burden of proving entitlement to reopening in Indian probate proceedings lies with the petitioner.

Estate of Louise Amiotte Lajtay, 12 IBIA 229 (Apr. 30, 1984)

When a party appeals a BLM decision, it is the obligation of the appellant to show that the determination is erroneous. Unless a statement of reasons shows adequate reasons for appeal and the allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration.

Howard J. Hunt, Howard B. Hunt, 80 IBLA 396 (May 14, 1984)

Where the United States contests a mining claim for lack of discovery of a valuable deposit, it has the burden of going forward to establish a prima facie case as to that charge; the mining claimant has the ultimate burden of overcoming, by a preponderance of the evidence, the Government's case. A prima facie case is established by the testimony of an expert witness who has examined the mineral deposits on the claim and the costs of mining those deposits, and concludes that the mineral deposits cannot be mined, removed, and marketed at a profit.

United States v. Albert D. Husmann et al., 81 IBLA 271 (June 8, 1984)

The burden of proving the error of an initial Departmental Indian probate decision is on the party challenging the decision.

Estate of Benjamin Kent, Sr. (Ben Nawapoway), 13 IBIA 21 (Aug. 29, 1984)

Implementation of the Taylor Grazing Act of 1934, as amended, is committed to the discretion of the Secretary of the Interior. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100.

Clyde L. Porius, Douglas L. Bown v. Bureau of Land Management, 83 IBLA 29 (Sept. 24, 1984)

DECISIONS

25 CFR 2.19 contemplates that, within 30 days after an appeal taken to the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 becomes ripe for decision, the appeal will either be decided by a written decision or referred to the Board of Indian Appeals for decision.

Clayton J. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984) 91 I.D. 43

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Oliver Redfield v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 190 (Mar. 2, 1984)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS

The holder of a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976), is required to pay annually, in advance, the fair market value of the grant. Appellant's contention that it should not pay annual rental is properly rejected where appellant's flood control project is completed but the right-of-way grant remains in effect and the land is being used for a dam, spillway, and reservoir.

Bench Lake Irrigation Co., 78 IBLA 305 (Jan. 12, 1984)

Due process does not require notice and a prior hearing in every case that an individual is deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

Where one serving as the mayor of a city and village corporation president receives actual notice of and participates in a Native allotment contest proceeding in which the city and village assert an interest, there is no denial of due process as to appellant city and village.

Village & City Council of Aleknagik, Ray M. Olson, Lawrence Murphy, Sr. (On Reconsideration), 80 IBLA 221 (Apr. 30, 1984)

Under 43 CFR 2802.1-7(e) (1974), which provided that charges for use and occupancy of a right-of-way may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure where the right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and has not been conformed to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982).

Cole Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. An oral hearing on a color-of-title application will be denied where there are no allegations of fact which would establish the color-of-title claim.

Kim C. Evans, 82 IBLA 319 (Sept. 6, 1984)

RULEMAKING

In deciding whether to adopt a newly enunciated rule retroactively the Board of Land Appeals has adopted the balance test which essentially rests on balancing the adverse effects of retroactivity with any statutory interest in applying the rule.

Victor M. Ortiz, Jr. (On Reconsideration), 82 IBLA 241 (Aug. 27, 1984)

ALASKA

GENERALLY

Where a pending application for a trade and manufacturing site became approved by passage of sec. 1328 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3215 (1982), other sections of the Act of May 14, 1898, as amended, 43 U.S.C. §§ 687a-687a-6 (1982), relating to payment of survey costs and purchase price remained in effect as to the application and satisfaction of these requirements is necessary before the land embraced by such an application can be patented.

Donna J. Waidtlow, 82 IBLA 247 (Aug. 28, 1984)

GRAZING

A grazing lease, issued after the lessee's daughter initiated her qualifying use and occupancy of a portion of the leased premises as a Native allotment claim, cannot bar the approval of the allotment. Moreover, a formal relinquishment by the lessee of the portion of the lease so occupied by his daughter was effective to terminate the grazing lease as to the relinquished land, so that upon his death two years later the lease, which passed to his widow, did not include the land within the allotment.

State of Alaska, Mary Frances DeHart, 82 IBLA 165 (Aug. 6, 1984)

HOMESTEADS

Sec. 1328(b) of the Alaska National Interest Lands Conservation Act provides that an applicant for a homestead may amend the land description contained in his application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed. If, following notice to the State of Alaska and all interested parties, a protest meeting the requirements of sec. 1328(a)(3) is timely filed against the application as amended, the legislative approval provided by sec. 1328(a)(1) shall not apply.

Richard L. Nevitt, 78 IBLA 300 (Jan. 10, 1984)

A homestead application segregates land from subsequent entry by a Native seeking to establish use and occupancy under the Native Allotment Act until the homestead entry is canceled on the official records of the Bureau of Land Management.

Where land included in a homestead entry is described among lands withdrawn subject to valid existing rights, the withdrawal attaches to the land upon cancellation of the entry.

Nick E. Desientieff, State of Alaska, 81 IBLA 303 (June 15, 1984)

IRRIGATION AND POWER

"Federal installation." The Beaver Falls Hydroelectric Power Project, which is operated by Ketchikan Public Utilities, a nonprofit division of the municipality of Ketchikan, pursuant to a license issued by the Federal Power Commission, is not a "Federal installation" and, therefore, the land occupied by the project is not being used in connection with the administration of any "Federal installation" within the meaning of 43 U.S.C. § 1602(e) (1976).

A licensee of the Federal Power Commission, or its successor, the Federal Energy Regulatory Commission, is

ALASKA--Continued

IRRIGATION AND POWER--Continued

not an agent of the licenser so as to qualify the licenser as a "holding agency" within the meaning of 43 CFR 2655.0-5(a).

Where Congress has provided in 16 U.S.C. § 818 (1982) that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to sec. 16 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1615 (1976), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

Federal land occupied by a municipally operated utility pursuant to a license from the Federal Power Commission may be conveyed to a Native corporation selecting such land, subject to such license. Lands occupied by the utility are not excluded from the interim conveyance describing them.

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

MINING CLAIMS

Under 43 CFR 2650.3-2(c), mineral patent applications may continue to be filed after Dec. 18, 1976, on land selected by village or regional corporations until such land is actually conveyed. Sec. 22(c) of Alaska Native Claims Settlement Act, 43 U.S.C. § 1621(c) (1976), prohibits the filing of such an application after Dec. 18, 1976, only if the land had been conveyed before the patent application was filed.

Doyon, Ltd., MTMT, Ltd. (On Reconsideration), 78 IBLA 327 (Jan. 24, 1984)

NATIVE ALLOTMENTS

Under sec. 905 of the Alaska National Interest Lands Conservation Act, a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. The Bureau of Land Management properly allows amendment of a description based on an old protraction diagram of the unsurveyed township, where necessary to locate the allotment on the same land based on a later plat of the surveyed township showing a change in the location of the area platted.

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potentially exclusive use of an allotment, and a Native corporation asserts that the land was in general use by the Native community, the Bureau of Land Management shall institute contest proceedings so that evidence as to applicant's entitlement to the allotment may be presented.

The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land and the filing of an application therefor. Where a Native files an application that BLM rejects before completion of the 5-year period, the Native has not acquired a vested right and maintains subsequent right to the land only by continuing possession of the land sufficient to put others on notice of his claim. If the Native does so, upon later reinstatement of the

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

rejected application he or she will acquire a vested right to the application.

Pedro Bay Co., 78 IBLA 196 (Jan. 5, 1984)

Sec. 1329(b) of the Alaska National Interest Lands Conservation Act provides that an applicant for a homestead may amend the land description contained in his application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed. If, following notice to the State of Alaska and all interested parties, a protest meeting the requirements of sec. 1328(a)(3) is timely filed against the application as amended, the legislative approval provided by sec. 1328(a)(1) shall not apply.

Richard L. Merritt, 78 IBLA 300 (Jan. 10, 1984)

Where a Native allotment application was approved after a Government contest and prior to the passage of sec. 905 of ANILCA, which legislatively approved pending allotment applications, sec. 905's 180-day protest rights providing for a hearing do not apply to this already adjudicated and approved application.

Village & City Council of Aleknagik, May M. Olsen, Lawrence Murphy, Sr. (On Reconsideration), 80 IBLA 221 (Apr. 30, 1984)

A homestead application segregates land from subsequent entry by a Native seeking to establish use and occupancy under the Native Allotment Act until the homestead entry is canceled on the official records of the Bureau of Land Management.

Nick K. Demientieff, State of Alaska, 81 IBLA 303 (June 15, 1984)

Where a trail was cut across a tract of land by the father of a Native allotment applicant a few years prior to her occupancy of the tract, but was used only by her father's hunting clients and perhaps one or two other hunting parties each hunting season, such use does not constitute either occupancy or appropriation of the land such as would bar the applicant's claim to it as "vacant and unappropriated land."

A grazing lease, issued after the lessee's daughter initiated her qualifying use and occupancy of a portion of the leased premises as a Native allotment claim, cannot bar the approval of the allotment. Moreover, a formal relinquishment by the lessee of the portion of the lease so occupied by his daughter was effective to terminate the grazing lease as to the relinquished land, so that upon his death two years later the lease, which passed to his widow, did not include the land within the allotment.

State of Alaska, Mary Frances DeHart, 82 IBLA 165 (Aug. 6, 1984)

OIL AND GAS LEASES

The DOI Fiscal 1981 Appropriations Act authority to lease oil and gas in the National Petroleum Reserve--Alaska (NPR-A) is authority independent of the Mineral Lands Leasing Act of 1920 and applicable to all lands within the boundaries of the NPR-A. The

ALASKA--Continued

OIL AND GAS LEASES--Continued

Department sought such authority and the two Appropriations Committees worked to establish such independent authority.

Authorization for Oil and Gas Leasing on the National Petroleum Reserve--Alaska, M-36940 (Oct. 15, 1981) 91 I.D. 1

POSSESSORY RIGHTS

The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land and the filing of an application therefor. Where a Native files an application that BLM rejects before completion of the 5-year period, the Native has not acquired a vested right and maintains subsequent right to the land only by continuing possession of the land sufficient to put others on notice of his claim. If the Native does so, upon later reinstatement of the rejected application he or she will acquire a vested right to the application.

Pedro Bay Co., 78 IBLA 196 (Jan. 5, 1984)

Where a pending application for a trade and manufacturing site became approved by passage of sec. 1328 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3215 (1982), other sections of the Act of May 14, 1898, as amended, 43 U.S.C. §§ 687a-687a-6 (1982), relating to payment of survey costs and purchase price remained in effect as to the application and satisfaction of these requirements is necessary before the land embraced by such an application can be patented.

Donna J. Waidtlow, 82 IBLA 247 (Aug. 28, 1984)

TRADE AND MANUFACTURING SITES

Where a pending application for a trade and manufacturing site became approved by passage of sec. 1328 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3215 (1982), other sections of the Act of May 14, 1898, as amended, 43 U.S.C. §§ 687a-687a-6 (1982), relating to payment of survey costs and purchase price remained in effect as to the application and satisfaction of these requirements is necessary before the land embraced by such an application can be patented.

Where an applicant for a trade and manufacturing site alleges that she timely mailed a notice of appeal of a decision setting forth estimated cost of survey but there is no evidence to indicate that it was ever received by the proper Bureau of Land Management office, the applicant must bear the consequences.

Donna J. Waidtlow, 82 IBLA 247 (Aug. 28, 1984)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Sec. 1328(b) of the Alaska National Interest Lands Conservation Act provides that an applicant for a homestead may amend the land description contained in his application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed. If, following notice to the State of Alaska and all interested parties, a protest meeting the requirements

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

GENERALLY--Continued

of sec. 1328(a)(3) is timely filed against the application as amended, the legislative approval provided by sec. 1328(a)(1) shall not apply.

Richard L. Nevitt, 78 IBLA 300 (Jan. 10, 1984)

Where a pending application for a trade and manufacturing site became approved by passage of sec. 1328 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3215 (1982), other sections of the Act of May 14, 1898, as amended, 43 U.S.C. §§ 687a-687a-6 (1982), relating to payment of survey costs and purchase price remained in effect as to the application and satisfaction of these requirements is necessary before the land embraced by such an application can be patented.

Donna J. Waldtlow, 82 IBLA 247 (Aug. 28, 1984)

SPECIAL LAND SETTLEMENTS

Under sec. 1427(e)(3)(A) of the Alaska National Interest Lands Conservation Act, 94 Stat. 2525, Ayakulik, Inc., a village corporation, is entitled only to the available lands within the "one mile square" exclusion of Public Land Order No. 1634.

Ayakulik, Inc., 82 IBLA 80 (July 17, 1984)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

ADMINISTRATIVE PROCEDURE

Generally

Prior to the conveyance of public lands subject to valid existing rights not leading to acquisition of title, but recognized under the Alaska Native Claims Settlement Act, there is no basis for an administrative appeal to enforce the valid existing rights claimed.

Manley Hot Springs Community Ass'n, 80 IBLA 313 (May 4, 1984)

Decision to Issue Conveyance

A claim of prior use of public lands does not preclude the selection and conveyance of the lands in accordance with the Alaska Native Claims Settlement Act, and a decision of the Bureau of Land Management to convey the public lands will be upheld against such a claim.

Manley Hot Springs Community Ass'n, 80 IBLA 313 (May 4, 1984)

APPEALS

Generally

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. Where BLM finds that site easements are not necessary to accomodate existing patterns of travel and an appealing party fails to show otherwise, the BLM decision will ordinarily be affirmed. Where BLM's decision rests on an assumption which is not supported

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

APPEALS--Continued

Generally--Continued

by facts of record, it must be set aside for the record to be supplemented.

State of Alaska, 78 IBLA 390 (Jan. 31, 1984)

Prior to the conveyance of public lands subject to valid existing rights not leading to acquisition of title, but recognized under the Alaska Native Claims Settlement Act, there is no basis for an administrative appeal to enforce the valid existing rights claimed.

Manley Hot Springs Community Ass'n, 80 IBLA 313 (May 4, 1984)

Standing

The State of Alaska has standing to challenge the failure of the Bureau of Land Management to reserve site easements along a navigable river by virtue of the property interest it holds in the submerged lands of the river and its allegations that site easements are necessary for a reasonable pattern of public travel and access to public lands along the river.

State of Alaska, 78 IBLA 390 (Jan. 31, 1984)

Standing to appeal decisions relating to land selections under the Alaska Native Claims Settlement Act requires that a party have a property interest in land affected by the decision. 43 CFR 4.410(b). The allegation of ownership and use of State and Federal lands as a member of the public does not establish standing.

Sierra Club, Alaska Chapter, et al., 79 IBLA 112 (Feb. 21, 1984)

CONVEYANCES

Generally

A claim of prior use of public lands does not preclude the selection and conveyance of the lands in accordance with the Alaska Native Claims Settlement Act, and a decision of the Bureau of Land Management to convey the public lands will be upheld against such a claim.

Manley Hot Springs Community Ass'n, 80 IBLA 313 (May 4, 1984)

With respect to a known party claiming a property interest adversely affected by a decision to issue conveyance under the Alaska Native Claims Settlement Act, both the regulations at 43 CFR 2650.7 and the requirements of due process mandate an effort to serve notice of the decision, coupled with a 30-day appeal period from date of service. Where such a party files a notice of appeal within 30 days of service of the decision, but not within 30 days of publication of that decision in the Federal Register, it is error for the Bureau of Land Management to dismiss the appeal as untisely.

Goodnews Bay Mining Co., et al., 81 IBLA 1 (May 14, 1984)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Easements

BLM may properly reserve a site easement pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(a) (1982), where the easement is reasonably necessary to guarantee a full right of public use because there are no reasonable alternative sites on publicly owned land which likewise guarantee such use, e.g., where the suggested alternative sites are within a bombing range under the jurisdiction of the Department of the Air Force.

Yaghotthele Corp., 81 IBLA 317 (June 19, 1984)

Interim Conveyance

Where Congress has provided in 16 U.S.C. § 818 (1982) that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to sec. 16 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1615 (1976), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

Native Groups

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because the members of the corporation do not compose more than one family or household as required by 43 CFR 2653.6(a)(5) will be affirmed on appeal where the facts show that the five Native members are a father and four of his children and that although one of the children was an adult on the critical census date and was head of a household in another area, the living situation at the group locality was that of a single family or household with the father as the head of that family or household.

Neechootaalichaagat Corp., 79 IBLA 301 (Mar. 20, 1984)

To establish its eligibility to select lands under the Alaska Native Claims Settlement Act, a Native group must constitute a majority of the residents in the locality. Where the record before the Board reveals disputed questions of fact as to the geographic boundaries of a Native group's locality as well as the resident population of the group on Apr. 1, 1970, the census enumeration date for determining Native group eligibility for land selection entitlement, the matter should be referred for hearing.

Chugach Natives, Inc., The Grouse Creek Corp., 80 IBLA 89 (Mar. 33, 1984)

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because the members of the corporation do not compose more than one family or household as required by 43 CFR 2653.6(a)(5) will be affirmed on appeal where the facts show that the seven Native members are a father, a mother, and five children, and that although one of the children was an adult on the critical census date and was head of a household in another area, the living situation at the group locality was that of a single

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Native Groups--Continued

family or household with the father as the head of that family or household.

Savonoski, Inc., 80 IBLA 231 (Apr. 30, 1984)

BLM may properly reject a Native group selection application filed pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), where, prior to Dec. 18, 1975, the land was withdrawn for village selections and at all times thereafter the land has been subject to a prior selection by a Native village corporation, such that the land is not available for selection under 43 CFR 2653.3(a).

Gold Creek-Susitna Native Ass'n, Inc., 81 IBLA 69 (May 23, 1984)

Where a certificate of ineligibility for status as a Native group was not sent by the Bureau of Indian Affairs to the person authorized in the record by the members of a Native group to be their agent for any and all legal effects for the group but was sent instead to a member of the Native group, at an incorrect address, the provisions of 43 CFR 2653.6(a)(6) were not followed, and the certificate of ineligibility was not served on the Native group.

Nabesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (Sept. 28, 1984)

Regional Conveyances

Under 43 CFR 2650.3-2(c), mineral patent applications may continue to be filed after Dec. 18, 1976, on land selected by village or regional corporations until such land is actually conveyed. Sec. 22(c) of Alaska Native Claims Settlement Act, 43 U.S.C. § 1621(c) (1976), prohibits the filing of such an application after Dec. 18, 1976, only if the land had been conveyed before the patent application was filed.

Doyon, Ltd., NANA, Ltd. (On Reconsideration), 78 IBLA 327 (Jan. 24, 1984)

Pursuant to the 1982 Chugach Natives, Inc., Settlement Agreement, the proviso of sec. 11 of P.L. 94-204 shall be included in any conveyance of lands to Chugach Natives, Inc., in the Icy Bay regional deficiency withdrawal area. A conveyance to that corporation which is not made expressly subject to such proviso will not be disturbed where it appears that the land at issue was not within the deficiency withdrawal area.

Henry Porter, George Bogren, Yak-Tat Kwaan, Inc., 81 IBLA 311 (June 18, 1984)

Valid Existing Rights

Generally

In accordance with sec. 14 of the Alaska Native Claim Settlement Act, the Bureau of Land Management's conveyances of public lands to a village corporation are made subject to valid existing rights in the lands, including rights of access.

Prior to the conveyance of public lands subject to valid existing rights not leading to acquisition of title, but recognized under the Alaska Native Claims

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Valid Existing Rights--Continued

Generally--Continued

Settlement Act, there is no basis for an administrative appeal to enforce the valid existing rights claimed.

Hagley Hot Springs Community Ass'n, 80 IBLA 313 (May 4, 1984)

With respect to an interim conveyance of land to a Native corporation pursuant to sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), the statute does not provide for the reservation of a private right of access to a mining claim, but such right of access is protected as a valid existing right under sec. 17(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1616(b)(2) (1975).

Herbert I. Stewart, Donald L. Ferguson, 82 IBLA 329 (Sept. 7, 1984)

Third-Party Interests

Federal land occupied by a municipally operated utility pursuant to a license from the Federal Power Commission may be conveyed to a Native corporation selecting such land, subject to such license. Lands occupied by the utility are not excluded from the interim conveyance describing them.

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

BLM may properly approve land for interim conveyance to a Native village corporation subject to certain third-party interests, if valid, and thereby reserve the question of whether those interests constitute valid existing rights under sec. 14(g) of ANCSA, as amended, 43 U.S.C. § 1613(g) (1982).

Ukpeagvik Inupiat Corp., 81 IBLA 222 (June 6, 1984)

Village Conveyances

Under 43 CFR 2650.3-2(c), mineral patent applications may continue to be filed after Dec. 18, 1976, on land selected by village or regional corporations until such land is actually conveyed. Sec. 22(c) of Alaska Native Claims Settlement Act, 43 U.S.C. § 1621(c) (1976), prohibits the filing of such an application after Dec. 18, 1976, only if the land had been conveyed before the patent application was filed.

Doyon, Ltd., MTNT, Ltd. (On Reconsideration), 78 IBLA 127 (Jan. 24, 1984)

Under sec. 1427(e)(3)(A) of the Alaska National Interest Lands Conservation Act, 94 Stat. 2525, Ayakulik, Inc., a village corporation, is entitled only to the available lands within the "one mile square" exclusion of Public Land Order No. 1634.

Ayakulik, Inc., 82 IBLA 80 (July 17, 1984)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

DEFINITIONS

Federal Installation

"Federal installation." The Beaver Falls Hydroelectric Power Project, which is operated by Ketchikan Public Utilities, a nonprofit division of the municipality of Ketchikan, pursuant to a license issued by the Federal Power Commission, is not a "Federal installation" and, therefore, the land occupied by the project is not being used in connection with the administration of any "Federal installation" within the meaning of 43 U.S.C. § 1602(e) (1976).

A licensee of the Federal Power Commission, or its successor, the Federal Energy Regulatory Commission, is not an agent of the licenser so as to qualify the licenser as a "holding agency" within the meaning of 43 CFR 2655.0-5(a).

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

BLM may properly include all land actually used in connection with the administration of a Federal installation during the period of time that the land was available for selection by the Native village corporation when defining land excluded from an interim conveyance to a Native village corporation under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), regardless of whether the Federal agency may thereafter contemplate relocation of the installation.

Ukpeagvik Inupiat Corp., 81 IBLA 222 (June 6, 1984)

Holding Agency

"Federal installation." The Beaver Falls Hydroelectric Power Project, which is operated by Ketchikan Public Utilities, a nonprofit division of the municipality of Ketchikan, pursuant to a license issued by the Federal Power Commission, is not a "Federal installation" and, therefore, the land occupied by the project is not being used in connection with the administration of any "Federal installation" within the meaning of 43 U.S.C. § 1602(e) (1976).

A licensee of the Federal Power Commission, or its successor, the Federal Energy Regulatory Commission, is not an agent of the licenser so as to qualify the licenser as a "holding agency" within the meaning of 43 CFR 2655.0-5(a).

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

Public Lands

Generally

"Federal installation." The Beaver Falls Hydroelectric Power Project, which is operated by Ketchikan Public Utilities, a nonprofit division of the municipality of Ketchikan, pursuant to a license issued by the Federal Power Commission, is not a "Federal installation" and, therefore, the land occupied by the project is not being used in connection with the administration of any "Federal installation" within the meaning of 43 U.S.C. § 1602(e) (1976).

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Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

DEFINITIONS--Continued

Public Lands--Continued

Generally--Continued

BLM may properly include all land actually used in connection with the administration of a Federal installation during the period of time that the land was available for selection by the Native village corporation when defining land excluded from an interim conveyance to a Native village corporation under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), regardless of whether the Federal agency may thereafter contemplate relocation of the installation.

Ukpeagvik Inupiat Corp., 81 IBLA 222 (June 6, 1984)

EASEMENTS

Generally

Sec. 17(b)(3) of ANCSA directs the Secretary of the Interior, after consultation, to reserve such public easements as he determines are necessary. In making easement reservations, the Secretary must adhere to the specific selection criteria set forth in sec. 17(b)(1) of ANCSA.

State of Alaska, 79 IBLA 335 (Mar. 22, 1984)

If BLM determines that a waterway through land to be conveyed pursuant to the Alaska Native Claims Settlement Act is a "major waterway," as defined in 43 CFR 2650.0-5(o), BLM must reserve in the land conveyance such public easements at periodic points along the waterway as are reasonably necessary to facilitate proper public use of the waterway after the conveyance.

State of Alaska, 81 IBLA 7 (May 14, 1984)

Access

BLM may properly reserve a site easement pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(a) (1982), where the easement is reasonably necessary to guarantee a full right of public use because there are no reasonable alternative sites on publicly owned land which likewise guarantee such use, e.g., where the suggested alternative sites are within a bombing range under the jurisdiction of the Department of the Air Force.

Toghotthele Corp., 81 IBLA 317 (June 19, 1984)

With respect to an interim conveyance of land to a Native corporation pursuant to sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), the statute does not provide for the reservation of a private right of access to a mining claim, but such right of access is protected as a valid existing right under sec. 17(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1616(b)(2) (1976).

Herbert I. Stewart, Donald J. Ferguson, 82 IBLA 329 (Sept. 7, 1984)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

EASEMENTS--Continued

Decision to Reserve

The State of Alaska has standing to challenge the failure of the Bureau of Land Management to reserve site easements along a navigable river by virtue of the property interest it holds in the submerged lands of the river and its allegations that site easements are necessary for a reasonable pattern of public travel and access to public lands along the river.

State of Alaska, 78 IBLA 390 (Jan. 31, 1984)

With respect to an interim conveyance of land to a Native corporation pursuant to sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), the statute does not provide for the reservation of a private right of access to a mining claim, but such right of access is protected as a valid existing right under sec. 17(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1616(b)(2) (1976).

Herbert I. Stewart, Donald J. Ferguson, 82 IBLA 329 (Sept. 7, 1984)

Public Easements

The Department's authority to reserve public easements across lands conveyed to a village corporation under the Alaska Native Claims Settlement Act is limited to providing access to lands not selected for conveyance.

Hadley Hot Springs Community Ass'n, 80 IBLA 313 (May 4, 1984)

A BLM decision reserving a public easement, which constitutes a buffer zone around a weather balloon launching facility, pursuant to sec. 17(b) of ANCSA, as amended, 43 U.S.C. § 1616(b) (1982), will be affirmed on appeal where the decision is supported by a rational basis.

Ukpeagvik Inupiat Corp., 81 IBLA 222 (June 6, 1984)

BLM may properly reserve a site easement pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(a) (1982), where the easement is reasonably necessary to guarantee a full right of public use because there are no reasonable alternative sites on publicly owned land which likewise guarantee such use, e.g., where the suggested alternative sites are within a bombing range under the jurisdiction of the Department of the Air Force.

Toghotthele Corp., 81 IBLA 317 (June 19, 1984)

Review

When a party appeals a BLM easement determination made pursuant to ANCSA, the burden of proof is upon the party challenging the determination to show that the decision is erroneous. A decision to reserve an easement will ordinarily be affirmed where it is supported by a rational basis. However, when the written assessment required by 43 CFR 2650.4-7 and the record do not provide a sufficient factual basis for the Board to determine the reasonableness of the BLM decision or the merits of the appellant's arguments, the decision will

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

EASEMENTS--Continued

Review--Continued

be set aside and the case remanded to BLM for compilation of a more complete record and a reevaluation of its easement decision.

State of Alaska, 79 IBLA 335 (Mar. 22, 1984)

When the record of BLM's final decision concerning the reservation of public easements in the conveyance of land pursuant to the Alaska Native Claims Settlement Act does not reveal any explanation of BLM's determination not to include the reservation of particular easements timely recommended by the State of Alaska, the Board will set aside the decision and require BLM to consider the State's recommendations and provide a written explanation of its decision in response to the recommendations.

State of Alaska, 81 IBLA 7 (May 14, 1984)

NATIVE LAND SELECTIONS

National Forest Land

Where Congress has provided in 16 U.S.C. § 818 (1982) that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to sec. 16 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1615 (1976), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

Village Selections

Federal land occupied by a municipally operated utility pursuant to a license from the Federal Power Commission may be conveyed to a Native corporation selecting such land, subject to such license. Lands occupied by the utility are not excluded from the interim conveyance describing them.

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

BLM may properly reject a Native group selection application filed pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), where, prior to Dec. 18, 1975, the land was withdrawn for village selections and at all times thereafter the land has been subject to a prior selection by a Native village corporation, such that the land is not available for selection under 43 CFR 2653.3(a).

Tyonek Native Corp., 81 IBLA 69 (May 23, 1984)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

WITHDRAWALS AND RESERVATIONS

Withdrawals for Native Selection

Generally

Where Congress has provided in 16 U.S.C. § 818 (1982) that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to sec. 16 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1615 (1976), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

APPEALS

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

A decision by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 that is not timely appealed to the Board of Indian Appeals is final for the Department.

25 CFR 2.19 contemplates that, within 30 days after an appeal taken to the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 becomes ripe for decision, the appeal will either be decided by a written decision or referred to the Board of Indian Appeals for decision.

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, notice to assume jurisdiction, or other document alleging Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to invoke the Board's jurisdiction automatically after the expiration of the time period.

Clayton J. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984) 91 I.D. 43

Where the Bureau of Land Management assesses the cumulative impacts of approving multiple permits to drill for oil and gas in a wilderness study area and wild horse range and makes an area-wide determination to permit such oil and gas development because it would have no significant effect on the area, an appeal of that determination challenging the adequacy of the

APPEALS--Continued

environmental assessment of the cumulative impacts is not premature.

Animal Protection Institute of America, Sierra Club, Colorado Open Space Council, 79 IBLA 94 (Feb. 17, 1984)
91 I.D. 115

Where a counsel moves to reopen a Board decision and the motion is granted, and the parties are given a period substantially in excess of the time requested in which to submit additional evidence but both fail to do so, the Board is entitled to dispose of the case by a summary affirmation of the original decision.

Jean Rodgers et al. (On Reconsideration), 5 OHA 266 (Feb. 24, 1984)

If an assignment is approved by BLM after BLM has received notice that a private dispute exists as to the validity or effect of the assignment, but before resolution of the private dispute, fairness dictates that the assignment be vacated to restore status quo pending resolution of the dispute.

Charles H. Dornan et al. (Appellants), Robert L. Meyer, Roger H. Ramser (Appellees), 79 IBLA 209 (Feb. 28, 1984)

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

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Oliver Redfield v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 190 (Mar. 2, 1984)

A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)
91 I.D. 165

An organization appealing a Bureau of Land Management decision will be considered a "party to a case" having standing to appeal an adverse decision of an officer of the Bureau of Land Management where the organization uses the lands in question and actively and extensively participates in the formulation of land use plans for the lands in question.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

APPEALS--Continued

A decision by an Administrative Law Judge setting aside a BLM decision rejecting the grazing preference application of the longstanding holder of a temporary nonrenewable license because of the equities in favor of the applicant will be set aside on appeal and remanded so that BLM may consider whether the applicant is entitled to a grazing permit for the additional forage within a particular allotment in accordance with 43 CFR 4110.3-1 and 4110.5.

Ray Forshall v. Bureau of Land Management, 80 IBLA 168 (Apr. 13, 1984)

The conclusion of proceedings under the Freedom of Information Act, as amended, 5 U.S.C. § 552 (1982), to acquire information related to the rationale for the production royalty set in a competitive coal lease does not constitute a final decision by BLM subject to an appeal to the Board, challenging the royalty. The appellant only had a right to protest the royalty set in the notice of the lease sale and to appeal from any denial of that protest.

Coastal States Energy Co., 80 IBLA 274 (May 4, 1984)

When a party appeals a BLM decision, it is the obligation of the appellant to show that the determination is erroneous. Unless a statement of reasons shows adequate reasons for appeal and the allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration.

Howard J. Hunt, Howard R. Hunt, 80 IBLA 396 (May 14, 1984)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

George Schultz et al., 81 IBLA 29 (May 17, 1984)

Where the resolution of an appeal depends on the determination of disputed issues of fact, the Board of Land Appeals will often refer the case for an evidentiary hearing on the record before an administrative law judge. However, when the administrative record appears to include nearly all of the available evidence, and affords an adequate basis for decision, and other circumstances indicate that an oral hearing would be unlikely to contribute substantially to the existing record, the Board may determine the facts and decide the appeal on the basis of the record before it.

State of Alaska, Mary Frances DeHart, 82 IBLA 165 (Aug. 6, 1984)

A notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Where an applicant for a trade and manufacturing site alleges that she timely mailed a notice of appeal of a decision setting forth estimated cost of survey but there is no evidence to indicate that it was ever received by the proper Bureau of Land Management office, the applicant must bear the consequences.

Donna J. Waidtlow, 82 IBLA 247 (Aug. 28, 1984)

APPEALS--Continued

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. An oral hearing on a color-of-title application will be denied where there are no allegations of fact which would establish the color-of-title claim.

Kim C. Evans, 82 IBLA 319 (Sept. 6, 1984)

Where a certificate of ineligibility for status as a Native group was not sent by the Bureau of Indian Affairs to the person authorized in the record by the members of a Native group to be their agent for any and all legal effects for the group but was sent instead to a member of the Native group, at an incorrect address, the provisions of 43 CFR 2653.6(a)(6) were not followed, and the certificate of ineligibility was not served on the Native group.

Where the record in a case establishes that the person authorized by a Native group to act as its agent had actual notice of a certificate of ineligibility for such group, and that the notice of appeal was not transmitted within 30 days of such notice, the notice of appeal must be dismissed. The timely filing of a notice of appeal is jurisdictional, and the Board has no authority to waive a jurisdictional requirement.

Yakutat Native Tribe, Inc. (On Reconsideration), 83 IBLA 82 (Sept. 28, 1984)

APPLICATIONS AND ENTRIES

GENERALLY

Where the Secretary of the Interior, or his delegate, by appropriate notice has classified certain lands for retention, an application for a permit to use land so classified is properly rejected.

Ronald L. Swafford, 78 IBLA 379 (Jan. 31, 1984)

The failure of a desert land entry applicant to promptly notify the authorizing BLM officer of a change of address does not, in itself, constitute an adequate basis for rejecting the application.

Keith L. McCabe, Jr., 81 IBLA 314 (June 18, 1984)

AMENDMENTS

When Arizona filed its original application for selection of land as part of its entitlement to compensation for deficiencies for school trust lands pursuant to its enabling act, the Department did not have segregation authority to protect the selections. During the promulgation of 43 CFR 2091.2-6, Arizona submitted a request to have the previous applications withdrawn, consolidated, and amended to include additional lands. This will be deemed a reapplication under the circumstances of this case, the filing of which enabled the Department to segregate the lands described therein under 43 CFR 2091.2-6. Mining claims subsequently initiated on lands that were segregated by the reapplication were properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

APPLICATIONS AND ENTRIES--Continued

FILING

Prior to the promulgation of 43 CFR 2091.2-6, the filing of a state indemnity selection application did not segregate the identified lands from operation of the mining laws prior to classification of the lands as suitable for indemnity selection.

Lee Shea Partnership, 80 IBLA 1 (Mar. 27, 1984)

When Arizona filed its original application for selection of land as part of its entitlement to compensation for deficiencies for school trust lands pursuant to its enabling act, the Department did not have segregation authority to protect the selections. During the promulgation of 43 CFR 2091.2-6, Arizona submitted a request to have the previous applications withdrawn, consolidated, and amended to include additional lands. This will be deemed a reapplication under the circumstances of this case, the filing of which enabled the Department to segregate the lands described therein under 43 CFR 2091.2-6. Mining claims subsequently initiated on lands that were segregated by the reapplication were properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

VESTED RIGHTS

The filing of a phosphate prospecting permit application creates no vested rights in the applicant and the application must be rejected if the land described therein is determined by Geological Survey to be within a known phosphate leasing area and to be subject to the competitive leasing provisions of the Mineral Leasing Act. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying phosphate bed, which finding requires competitive leasing of the land.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

The mere filing of a small tract application did not create in the applicant any right or interest in the land sought. An applicant for land under the Small Tract Act, 43 U.S.C. § 682a (1970), did not acquire any right or interest in the land embraced in his application by virtue of administrative delay in processing the application.

M. Lawrence Berk, 81 IBLA 366 (June 27, 1984)

An applicant for a phosphate prospecting permit under sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982), acquires no vested right to a permit by virtue of an inordinate delay in adjudication of the application, even where a permit might have issued when the application was originally filed.

Elizabeth B. Archer et al., 82 IBLA 14 (July 5, 1984)

APPRAISALS

The holder of a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976), is required to pay annually, in advance, the fair market value of the grant. Appellant's contention that it should not pay annual rental is properly rejected where appellant's flood control project is completed but the

APPRAISALS--Continued

right-of-way grant remains in effect and the land is being used for a dam, spillway, and reservoir.

Bench Lake Irrigation Co., 78 IBLA 305 (Jan. 12, 1984)

The preferred method for appraising the fair market value of nonlinear rights-of-way, including microwave transmission sites, is the comparable lease method of appraisal where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject sites and other leased sites.

Mountain States Telephone & Telegraph Co., 79 IBLA 5 (Feb. 2, 1984)

Where BLM has determined the fair market rental values of a communications site right-of-way in accordance with accepted appraisal procedures but on appeal the grantee presents a summary of evidence that, if proven, would establish that the charge is excessive, the matter will be referred for a hearing at the BLM State Office in accordance with the basic procedural standards set forth in Circle L, Inc., 36 IBLA 260 (1978)

Colorado-Ute Electric Ass'n, Inc., 79 IBLA 53 (Feb. 9, 1984)

An appraisal of a right-of-way for a haul road, granted pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), will be upheld on appeal if no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

Lone Star Steel Co., 79 IBLA 345 (Mar. 22, 1984)

Where the BLM granted a communications site right-of-way pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), subject to future appraisal, collection of a rental deposit at the time of the grant with a later adjustment in the annual rental charges upon receipt of an approved fair market value appraisal is not a prohibited imposition of a retroactive rental.

Appraisals of rights-of-way for communication sites will be upheld if there is no error in the appraisal methods used by the Bureau of Land Management and the appellant fails to show convincing evidence that the charges are excessive.

Mountain States Telephone & Telegraph Co., 80 IBLA 123 (Apr. 5, 1984)

Where there is no appraisal to support a readjusted rental rate for a water pipeline right-of-way, a decision imposing the readjusted rate must be reversed.

A. Keith Barben, 81 IBLA 332 (June 19, 1984)

An appraisal of fair market rental for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive.

Southern California Gas Co., 81 IBLA 358 (June 27, 1984)

APPRAISALS--Continued

Under 43 CFR 2802.1-7(e) (1974), which provided that charges for use and occupancy of a right-of-way may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure where the right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and has not been conformed to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982).

Where BLM appraises a parcel of land subject to a communication site right-of-way for direct sale to the holder of the grant pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), it is proper for BLM to appraise the parcel as if unencumbered, since the right-of-way is extinguished upon the right-of-way holder's acquisition of the fee title.

Cole Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

Where sufficient doubt is raised about the method of an appraisal of fair market rental value for a residential occupancy permit, the case may be remanded for the Bureau of Land Management to conduct a further appraisal or adjust the appraised value.

Clinton Iverson, 83 IBLA 72 (Sept. 28, 1984)

ATTORNEY'S FEES

GENERALLY

In considering a petition for the award of attorney fees in an Indian probate proceeding, the Board will examine the itemized list of services provided to the client to determine whether each item is allowable.

In re Attorney Fees Request of Joanne Foster & In re Attorney Fees Request of P. J. Sferra, 12 IBIA 172 (Feb. 10, 1984)

ATTORNEYS

The fact that an individual participating in a Departmental Indian probate proceeding is not represented by counsel does not entitle him to special rights not enjoyed by individuals who are so represented.

Estate of Wesley Fassett Aston, 12 IBIA 139 (Jan. 23, 1984)

Qualifications to practice before the Department of the Interior are prescribed by regulations. Where an appeal is brought by an individual who does not appear to fall within any of the categories of persons authorized to practice, the appeal is subject to dismissal.

Robert N. Caldwell, 79 IBLA 141 (Feb. 22, 1984)

BOARD OF INDIAN APPEALS

JURISDICTION

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

A decision by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 that is not timely appealed to the Board of Indian Appeals is final for the Department.

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, motion to assume jurisdiction, or other document alleging Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to invoke the Board's jurisdiction automatically after the expiration of the time period.

Clayton J. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984) 91 I.D. 83

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Oliver Redfield v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 190 (Mar. 2, 1984)

The Board of Indian Appeals does not have jurisdiction to review a decision of the Bureau of Indian Affairs that is based on the exercise of discretion.

Cheyenne & Arapaho Tribes of Western Oklahoma v. Deputy Ass't Secretary--Indian Affairs (Operations), Reading & Bates Petroleum Co., & Woods Petroleum Corp. (On Reconsideration), 12 IBIA 241 (May 18, 1984) 91 I.D. 229

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Neither the Board of Indian Appeals nor the Department of the Interior has review authority over matters entrusted to state, federal, or tribal courts.

Neither the Board of Indian Appeals nor the Department of the Interior is the proper forum for consideration of questions relating to nontrust property held by Indians.

Estate of Alice Mae Sasse, 12 IBIA 281 (June 25, 1984)

Although the Board of Indian Appeals does not have general review jurisdiction over decisions of the Assistant Secretary for Indian Affairs, 43 CFR 4.330 permits the Assistant Secretary to refer any matter concerning Indians to the Board.

Teresa L. Garrett v. Ass't Secretary for Indian Affairs, 13 IBIA 8 (Aug. 21, 1984) 91 I.D. 262

BOARD OF LAND APPEALS

A duly promulgated Departmental regulation has the force and effect of law and is binding upon all officials of the Department, including the Board of Land Appeals and the Secretary, and may not be waived.

A. Z. Shows, 82 IBLA 86 (July 17, 1984)

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Andy D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

Where the resolution of an appeal depends on the determination of disputed issues of fact, the Board of Land Appeals will often refer the case for an evidentiary hearing on the record before an administrative law judge. However, when the administrative record appears to include nearly all of the available evidence, and affords an adequate basis for decision, and other circumstances indicate that an oral hearing would be unlikely to contribute substantially to the existing record, the Board may determine the facts and decide the appeal on the basis of the record before it.

State of Alaska, Mary Frances DeHart, 82 IBLA 165 (Aug. 6, 1984)

To the extent a management plan decision for the Yaquina Head Outstanding Natural Area is the final implementation decision on certain actions, it is a decision appealable to the Board of Land Appeals under 43 CFR Part 4.

Oregon Shores Conservation Coalition, Bruce Waugh, 83 IBLA 1 (Sept. 17, 1984)

BOUNDARIES

Where riparian public land has been completely eroded away by the actions of a navigable river, title is lost to the United States and, where said land is subsequently restored through accretion by the continued action of the river, title belongs to the riparian owner.

David A. Provance, 81 IBLA 148 (May 31, 1984)

BUREAU OF INDIAN AFFAIRS

ADMINISTRATIVE APPEALS

Generally

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

25 CFR 2.19 contemplates that, within 30 days after an appeal taken to the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 becomes ripe for decision, the appeal will either be decided by a written decision or referred to the Board of Indian Appeals for decision.

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, motion to assume jurisdiction, or other document alleging Board jurisdiction. The original filing under 25 CFR 2.18(a) is insufficient to invoke the Board's jurisdiction automatically after the expiration of the time period.

Clayton J. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984) 91 I.D. 43

A determination under 25 CFR 2.17 as to whether an appeal should be dismissed or decided on the merits when an appellant has failed to submit supporting argumentation must be based on the facts of each case.

U.S.C. Corliss, Inc. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 181 (Mar. 1, 1984)

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations)

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Upon the expiration of the 30-day time period for decision established in 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, motion to assume jurisdiction, or other document alleging Board jurisdiction.

Oliver Redfield v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 190 (Mar. 2, 1984)

Discretionary Decisions

The Board of Indian Appeals does not have jurisdiction to review a decision of the Bureau of Indian Affairs that is based on the exercise of discretion.

Cheyenne & Arapaho Tribes of Western Oklahoma v. Deputy Ass't Secretary--Indian Affairs (Operations), Reading & Bates Petroleum Co., & Woods Petroleum Corp. (On Reconsideration), 12 IBIA 241 (May 18, 1984) 91 I.D. 229

The Board of Indian Appeals will refer a case to the Bureau of Indian Affairs in accordance with 43 CFR 4.337(b) when the decision involves the exercise of discretion committed to the Secretary.

Terese L. Garrett v. Ass't Secretary for Indian Affairs, 13 IBIA 8 (Aug. 21, 1984) 91 I.D. 262

Leases

A decision of the Bureau of Indian Affairs that cancels a lease of Indian trust lands generally involves an interpretation of the lease provisions, relevant Federal regulations governing cancellation procedures, and applicable Federal, state, and tribal case and statutory law. Such a decision cannot properly be characterized under 25 CFR 2.19 as solely discretionary.

Clayton J. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984) 91 I.D. 43

COAL LEASES AND PERMITS

APPLICATIONS

The regulation at 43 CFR 3430.4-1(c) allows a coal preference right lease applicant 90 days in which to respond to a Bureau of Land Management request for final showing of the existence of commercial quantities of coal. A decision rejecting a preference right lease application on the ground that the information was filed after the 90-day period will be reversed where applicant requested an extension of time, there is no evidence of bad faith on the part of the applicant, and no indication that the late filing unduly interfered with the administration of the public lands.

Peabody Coal Co., 79 IBLA 58 (Feb. 9, 1984)

COAL LEASES AND PERMITS--Continued

LEASES

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

The Board of Land Appeals will not reverse as unreasonable a readjustment of an underground coal lease establishing a royalty of 8 percent, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1976) if needed.

The Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1976), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the amendments.

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, since any authorized use would be subject to the lease.

Mid-Continent Coal & Coke Co., 78 IBLA 178 (Jan. 4, 1984)

Departmental regulation 43 CFR 3473.3-2(a)(1) and (4)(3) implementing 30 U.S.C. § 207(a) (1976), provides that a royalty rate as low as 5 percent may be established for an underground coal mine at lease issuance if conditions warrant such reduced royalty rate. A BLM decision overruling a coal lessee's objection to a provision in readjusted coal leases establishing a royalty rate of 8 percent will be set aside and remanded where, on appeal, BLM admits that the Board remand the cases to BLM to allow the lessee the opportunity to establish that the conditions warrant a royalty rate of less than 8 percent.

Utah Power & Light Co., 80 IBLA 180 (Apr. 16, 1984)

The conclusion of proceedings under the Freedom of Information Act, as amended, 5 U.S.C. § 552 (1982), to acquire information related to the rationale for the production royalty set in a competitive coal lease does not constitute a final decision by BLM subject to an appeal to the Board, challenging the royalty. The appellant only had a right to protest the royalty set in the notice of the lease sale and to appeal from any denial of that protest.

The Department is not estopped to dismiss an appeal challenging the production royalty set in a competitive coal lease, where the appellant failed to protest the notice of the lease sale, by virtue of the Department's subsequent refusal to provide information essential to determining the validity of the challenged royalty.

Coastal States Energy Co., 80 IBLA 274 (May 4, 1984)

Where a coal lease issued prior to Aug. 4, 1976, the date of enactment of the Federal Coal Leasing Amendments Act of 1976, provides that the United States can readjust its terms and conditions at the end of 20 years, notice of readjustment or notice of intent to readjust must be given to the lessee at or before the expiration of that 20-year period.

Notice of intent to readjust a Federal coal lease which notice is received by the lessee on Nov. 16, 1978, for a lease whose 20-year readjustment date expired Oct. 1, 1978, is untimely and readjusted terms

COAL LEASES AND PERMITS--Continued

LEASES--Continued

and conditions may not be imposed pursuant to such notice.

Pittsburg & Midway Coal Mining Co., 81 IBLA 81 (May 24, 1984)

BLM is not barred from readjusting the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1976), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is filed prior to the end of the 20-year primary term of the lease.

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the land. However, where the requirements of a coal lease are not in conformance with a statute or regulation or the proper administration of the land, or are in apparent internal conflict or not clear as to their application to existing mining operations, the BLM decision will be set aside to that extent and remanded for amendment.

At the time of readjustment of the terms of a coal lease, BLM may, consistent with the policy of the Minerals Management Service, set the royalty rate at 8 percent for underground operations and refuse to consider a reduction of the rate to 5 percent, under the discretionary authority embodied in 43 CFR 3473.3-2(a)(3).

Coastal States Energy Co., 81 IBLA 171 (May 31, 1984)

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the lands.

The mere fact that a readjusted coal lease expressly provides that regulations adopted subsequent thereto may be applied does not, ipso facto, make the provisions of the lease fatally indefinite, since it is further provided that express provisions of the lease are not subject to alteration by later regulatory amendments. The applicability to the lease of any specific regulatory provision, however, can only be determined where such regulations have been promulgated and a lessee can show injury in fact in their application.

Where a coal lessee has been timely informed that BLM intends to readjust his lease upon the running of its initial term and has been provided with a copy of the terms which the Government seeks to impose on the lease, the timely filing of a protest prevents the proposed terms from becoming final until BLM has ruled on the protest. BLM may, in ruling on the protest, alter or amend provisions not being protested so long as BLM can provide a reasonable basis in fact for its actions.

The Board of Land Appeals will not reverse as unreasonable a readjustment of an underground coal lease establishing a royalty of 8 percent, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982) if needed.

The Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the amendments.

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the

COAL LEASES AND PERMITS--Continued

LEASES--Continued

exploration and mining operations of the lessee, since any other authorized use would be subject to the lease.

Where a coal lessee is informed that his lease is being amended to add additional land thereto, and is expressly advised that the additional land will be considered to have been included in the lease as of the date of issuance of the original lease, a lessee who objects to this must file an appeal within 30 days after being notified or is thereafter barred from litigating the propriety of the amendment within the Department.

Mid-Continent Coal & Coke Co., 83 IBLA 56 (Sept. 25, 1984)

READJUSTMENT

BLM is not barred from readjusting the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. ss 201-209 (1976), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is filed prior to the end of the 20-year primary term of the lease.

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the land. However, where the requirements of a coal lease are not in conformance with a statute or regulation or the proper administration of the land, or are in apparent internal conflict or not clear as to their application to existing mining operations, the BLM decision will be set aside to that extent and remanded for amendment.

At the time of readjustment of the terms of a coal lease, BLM may, consistent with the policy of the Minerals Management Service, set the royalty rate at 8 percent for underground operations and refuse to consider a reduction of the rate to 5 percent, under the discretionary authority embodied in 43 CFR 3473.3-2(a)(3).

Coastal States Energy Co., 81 IBLA 171 (May 31, 1984)

ROYALTIES

The conclusion of proceedings under the Freedom of Information Act, as amended, 5 U.S.C. s 552 (1982), to acquire information related to the rationale for the production royalty set in a competitive coal lease does not constitute a final decision by BLM subject to an appeal to the Board, challenging the royalty. The appellant only had a right to protest the royalty set in the notice of the lease sale and to appeal from any denial of that protest.

The Department is not estopped to dismiss an appeal challenging the production royalty set in a competitive coal lease, where the appellant failed to protest the notice of the lease sale, by virtue of the Department's subsequent refusal to provide information essential to determining the validity of the challenged royalty.

Coastal States Energy Co., 80 IBLA 274 (May 4, 1984)

COAL LEASES AND PERMITS--Continued

ROYALTIES--Continued

At the time of readjustment of the terms of a coal lease, BLM may, consistent with the policy of the Minerals Management Service, set the royalty rate at 8 percent for underground operations and refuse to consider a reduction of the rate to 5 percent, under the discretionary authority embodied in 43 CFR 3473.3-2(a)(3).

Coastal States Energy Co., 81 IBLA 171 (May 31, 1984)

COLOR OR CLAIM OF TITLE

GENERALLY

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory conditions for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

Malcolm C. & Helena M. Fuqua, 80 IBLA 53 (Mar. 29, 1984)

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory conditions for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to any one of the elements is fatal to the application.

A class 1 color-of-title claim must be based upon a document which appears to convey the claimed land to claimants or their predecessors. In the absence of any documentary evidence of claim of title, a color-of-title application is properly rejected by the Bureau of Land Management.

Acquiring title to Federal lands by tax deed from a local authority that mistakenly believes it has title to the lands initiates a new title for the purposes of determining when possession under color of title commenced. Thus, a tax deed is sufficient to support a claim of title if held by claimants or their predecessors at the beginning of the 20-year period for class 1 claims.

Paul Marshall et al., 82 IBLA 298 (Aug. 31, 1984)

An application for a class 1 color-of-title claim requires that the land has been held in good faith, and in peaceful, adverse possession by the claimant or her predecessors in title. Good faith requires that the claimant and her predecessors honestly believe that they were invested with title.

An application for a class 1 color-of-title claim requires that the land be held in good faith for at least 20 years by the claimant or her predecessors in title. If a predecessor in title held the land in good faith, then her title may be tacked onto that of the claimant. A claimant may not rely on the good faith possession of remote predecessors despite the bad faith of her immediate predecessors. Once the chain of good faith possession is broken, it must begin anew.

The obligation of proving a valid color-of-title claim is upon the claimant. A claimant's failure to

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

carry the burden of proof on one of the elements is fatal to the application.

Kim C. Evans, 82 IBLA 319 (Sept. 6, 1984)

APPLICATIONS

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory conditions for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

Malcolm C. & Helena M. Huston, 80 IBLA 53 (Mar. 29, 1984)

An applicant under the Color of Title Act must establish that the statutory and regulatory conditions for purchase have been met. Failure to carry the burden of proof with respect to any one of the elements of the claim asserted is fatal to the application.

Good faith as that term is used in the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that a claimant and his predecessors in interest reasonably believe that no defect exists in the title to the land claimed. The Department may consider whether a claimant's belief was unreasonable in light of the facts actually known or available to the claimant or a predecessor.

Lawrence T. Abraham et al., 82 IBLA 285 (Aug. 31, 1984)

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory conditions for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to any one of the elements is fatal to the application.

A class 1 color-of-title claim must be based upon a document which appears to convey the claimed land to claimants or their predecessors. In the absence of any documentary evidence of claim of title, a color-of-title application is properly rejected by the Bureau of Land Management.

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An application for a class 1 color-of-title claim requires that the land be held in good faith for at least 20 years by the claimant or her predecessors in title. If a predecessor in title held the land in good faith, then her time may be tacked onto that of the claimant. A claimant may not rely on the good faith possession of remote predecessors despite the bad faith of her immediate predecessors. Once the chain of good faith possession is broken, it must begin anew.

The obligation of proving a valid color-of-title claim is upon the claimant. A claimant's failure to

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

carry the burden of proof on one of the elements is fatal to the application.

Kim C. Evans, 82 IBLA 319 (Sept. 6, 1984)

CULTIVATION

To establish a class 1 color-of-title claim, made under the Color of Title Act, land must be reduced to cultivation at the time of filing the claim application. Although the continued planting of fruit and nut trees on a yearly basis is such activity that may qualify for cultivation of agricultural crops, that activity will not qualify under the Color of Title Act when conducted after the applicant has become aware of the fact that his title to the land is defective.

Malcolm C. & Helena M. Huston, 80 IBLA 53 (Mar. 29, 1984)

GOOD FAITH

Good faith as that term is used in the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that a claimant and his predecessors in interest reasonably believe that no defect exists in the title to the land claimed. The Department may consider whether a claimant's belief was unreasonable in light of the facts actually known or available to the claimant or a predecessor.

Lawrence T. Abraham et al., 82 IBLA 285 (Aug. 31, 1984)

An application for a class 1 color-of-title claim requires that the land has been held in good faith, and in peaceful, adverse possession by the claimant or her predecessors in title. Good faith requires that the claimant and her predecessors honestly believe that they were invested with title.

Kim C. Evans, 82 IBLA 319 (Sept. 6, 1984)

IMPROVEMENTS

To establish a class 1 color-of-title claim, made under the Color of Title Act, claimed improvements must enhance the value of the land. A one-lane dirt road that passes through the applied for tract as access to adjacent land cannot be considered a valuable improvement.

Malcolm C. & Helena M. Huston, 80 IBLA 53 (Mar. 29, 1984)

PRIVITY

Acquiring title to Federal lands by tax deed from a local authority that mistakenly believes it has title to the lands initiates a new title for the purposes of determining when possession under color of title commenced. Thus, a tax deed is sufficient to support a claim of title if held by claimants or their predecessors at the beginning of the 20-year period for class 1 claims.

Paul Marshall et al., 82 IBLA 298 (Aug. 31, 1984)

COMMUNICATION SITES

The preferred method for appraising the fair market value of nonlinear rights-of-way, including microwave transmission sites, is the comparable lease method of appraisal where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject sites and other leased sites.

Mountain States Telephone & Telegraph Co., 79 IBLA 5 (Feb. 2, 1984)

Where BLM has determined the fair market rental values of a communications site right-of-way in accordance with accepted appraisal procedures but on appeal the grantee presents a summary of evidence that, if proven, would establish that the charge is excessive, the matter will be referred for a hearing at the BLM State Office in accordance with the basic procedural standards set forth in Circle K, Inc., 36 IBLA 260 (1978).

Colorado-Ute Electric Ass'n, Inc., 79 IBLA 53 (Feb. 9, 1984)

Where the BLM granted a communications site right-of-way pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), subject to future appraisal, collection of a rental deposit at the time of the grant with a later adjustment in the annual rental charges upon receipt of an approved fair market value appraisal is not a prohibited imposition of a retroactive rental.

Appraisals of rights-of-way for communication sites will be upheld if there is no error in the appraisal methods used by the Bureau of Land Management and the appellant fails to show convincing evidence that the charges are excessive.

Mountain States Telephone & Telegraph Co., 80 IBLA 128 (Apr. 5, 1984)

An appraisal of fair market rental for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive.

Southern California Gas Co., 81 IBLA 358 (June 27, 1984)

Under 43 CFR 2802.1-7(a) (1974), which provided that charges for use and occupancy of a right-of-way may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure where the right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and has not been conformed to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982).

Where BLM appraises a parcel of land subject to a communication site right-of-way for direct sale to the holder of the grant pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), it is proper for BLM to appraise the parcel as if unencumbered, since the right-of-way is extinguished upon the right-of-way holder's acquisition of the fee title.

Cole Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

CONFIDENTIAL INFORMATION

"Proprietary information." Proprietary information means information which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would inhibit the Government's ability to obtain this type of information in the future resulting in a substantial detrimental effect on a Government program. Internally generated Governmental conclusions and information are not generally proprietary.

Craig Folsom, 82 IBLA 294 (Aug. 31, 1984)

CONSTITUTIONAL LAW

GENERALLY

The Department of the Interior, as an agency of the executive branch of Government, is without authority to waive requirements imposed by statute.

Jerald A. Waters, 78 IBLA 387 (Jan. 31, 1984)

A state retains extensive jurisdiction over Federal lands within its boundary, but Congress is authorized to enact legislation regarding the use and occupancy of the Federal lands. Provisions of state law regarding abandonment of a right-of-way within a reclamation withdrawal must recede where implementation thereof would interfere with the effort of reclamation officials to operate and maintain reclamation facilities as directed by Act of Congress.

County of Imperial, 5 OHA 286 (Mar. 16, 1984)

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Andy D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

DUE PROCESS

Due process does not require notice and a prior hearing in every case that an individual is deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

Where one serving as the mayor of a city and village corporation president receives actual notice of and participates in a Native allotment contest proceeding in which the city and village assert an interest, there is no denial of due process as to appellant city and village.

Village & City Council of Alakanuk, Ray M. Olsen, Lawrence Murphy, Sr. (On Reconsideration), 80 IBLA 221 (Apr. 30, 1984)

CONSTITUTIONAL LAW--Continued

DUE PROCESS--Continued

With respect to a known party claiming a property interest adversely affected by a decision to issue conveyance under the Alaska Native Claims Settlement Act, both the regulations at 43 CFR 2650.7 and the requirements of due process mandate an effort to serve notice of the decision, coupled with a 30-day appeal period from date of service. Where such a party files a notice of appeal within 30 days of service of the decision, but not within 30 days of publication of that decision in the Federal Register, it is error for the Bureau of Land Management to dismiss the appeal as untimely.

Goodnews Bay Mining Co. et al., 81 IBLA 1 (May 14, 1984)

Due process requirements are met so long as notice is given and an opportunity to be heard is granted before deprivation of property becomes final.

Citizens for the Preservation of Knox County, 81 IBLA 209 (June 5, 1984)

CONTESTS AND PROTESTS

GENERALLY

Under 5 U.S.C. § 504 (1982) and 43 CFR 4.603, 48 FR 17596 (Apr. 25, 1983), an adversary adjudication is one required by statute to be conducted by the Secretary under 5 U.S.C. § 554 (1982). Because there is no statutory requirement that a mining claim contest be conducted under 5 U.S.C. § 554 (1982), mining claim contests are not proceedings covered by Equal Access to Justice Act.

Kaycee Bentonite Corp., 79 IBLA 182 (Feb. 28, 1984)
91 I.D. 138

CONTRACTS

GENERALLY

Cancellation of a lease or portion of a lease is improper when it was not issued in violation of any statute or regulation.

John Blorce Castle, 81 IBLA 53 (May 22, 1984)

CONSTRUCTION AND OPERATION

Actions of Parties

Where three of four extra work orders covering drilling and blasting work performed by a subcontractor provided for no reimbursement to the contractor and where the fourth extra work order was used as a vehicle to reimburse the contractor for the rental of its pumps at agreed upon rates without any evidence having been offered at the hearing to show that any amount was included therein for costs resulting from delays to the contractor's work, the Government's contention that the contractor's acceptance of the four extra work orders constituted an accord and satisfaction is rejected by the Board since it is well settled that an agreement does not operate as an accord as to matters not covered by the agreement.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984)
91 I.D. 71

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

Where for over half the duration of the contract performance period the contractor routinely submitted direct billings for holiday pay, and the responsible Government official approved and certified them, and payment was made to the contractor, the Board finds that such conduct by the parties prior to the onset of a dispute, is entitled to great weight in determining that the contract did not contain overhead rates for holiday pay.

Moving Services, Ltd., IBCA-1540-12-81 (Apr. 9, 1984)

Allowable Costs

In its quantum consideration, after finding entitlement to equitable adjustments, the Board allowed amounts claimed by the contractor for depreciation, and improperly withheld by the Government for liquidated damages. It approved the claimed rate of profit disallowed by the Government auditor and the bulk of the audited total costs. However, the Board disallowed a claim for the increased price of asphalt upon finding a failure of proof that either the contractor or its supplier paid or incurred increased costs for asphalt, and, disallowed a claim for costs attributed to a winter shutdown upon finding that the contractor had agreed that such shutdown would be at no additional cost to the Government. Upon finding some fault with the Government audit upon which the contractor based its total cost theory of recovery, and dissatisfaction with the accuracy or specificity available for a precise calculation of certain other costs claimed, as well as with the contractor's proposed formula for calculating costs per day for days of delay, the Board determines that application of the jury verdict approach is both practicable and reasonable in arriving at the equitable adjustment award to the contractor.

Appeal of Wylie Brothers Contracting Co., IBCA-1175-11-77 (Jan. 27, 1984)
91 I.D. 51

Where a contractor appeals from a Government claim for refund of overpayments of overhead expense based on excluding purchased labor from the direct labor base, the refund claim is denied and the appeal is sustained where the parties entered into an agreement for a fixed overhead rate during performance without defining the direct labor base, and the evidence supports appellant's claim that negotiations and invoicing were based on its consistent practice of including purchased labor in the base.

Appeal of Management Concepts, Inc., IBCA-1601-7-82 (July 10, 1984)

Changes and Extras

Upon finding that the contractor's continuous performance in the early stages of a road construction project was substantially disrupted by the Government because of grade and slope revisions resulting in delayed delivery of a final structures list, the Board holds that a constructive change occurred entitling appellant to an equitable adjustment for resulting extra costs.

Appeal of Wylie Brothers Contracting Co., IBCA-1175-11-77 (Jan. 27, 1984)
91 I.D. 51

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

The Board concludes that the specifications under a Government construction contract for the rental of draglines with operators are defective where it finds (i) that the terms of the solicitation respecting supervision were ambiguous; (ii) that the interpretation the contractor placed upon the ambiguous provisions was reasonable, as evidenced by the Government's concurrence in such interpretation prior to the time a dispute arose; (iii) that the bifurcation of authority between the COR at the jobsite and the refuge manager some 35 miles away continued for at least several months after the issuance of the notice to proceed; and (iv) that confusion over who was responsible for supervision and the manner in which it was exercised seriously delayed the contractor and resulted in the partnership incurring substantial additional expenses.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Conflicting Clauses

The Board concludes that the specifications under a Government construction contract for the rental of draglines with operators are defective where it finds (i) that the terms of the solicitation respecting supervision were ambiguous; (ii) that the interpretation the contractor placed upon the ambiguous provisions was reasonable, as evidenced by the Government's concurrence in such interpretation prior to the time a dispute arose; (iii) that the bifurcation of authority between the COR at the jobsite and the refuge manager some 35 miles away continued for at least several months after the issuance of the notice to proceed; and (iv) that confusion over who was responsible for supervision and the manner in which it was exercised seriously delayed the contractor and resulted in the partnership incurring substantial additional expenses.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Construction Against Drafter

The Board concludes that the specifications under a Government construction contract for the rental of draglines with operators are defective where it finds (i) that the terms of the solicitation respecting supervision were ambiguous; (ii) that the interpretation the contractor placed upon the ambiguous provisions was reasonable, as evidenced by the Government's concurrence in such interpretation prior to the time a dispute arose; (iii) that the bifurcation of authority between the COR at the jobsite and the refuge manager some 35 miles away continued for at least several months after the issuance of the notice to proceed; and (iv) that confusion over who was responsible for supervision and the manner in which it was exercised seriously delayed the contractor and resulted in the partnership incurring substantial additional expenses.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Contract Clauses

Where a contractor leased a helicopter to the Government, but before the end of the lease period, the helicopter was destroyed, the Board found that the inability or unwillingness of the contractor upon demand to furnish a replacement helicopter for the remainder of lease period constituted nonperformance of a contractual obligation on the part of the contractor and held that such nonperformance relieved the

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract Clauses--Continued

Government from payment for any contractually guaranteed minimum use of the aircraft.

Where a contract for the lease of a helicopter by the Government contained a Loss or Damage to Leased Aircraft clause whereby the Government assumed the risk of loss and agreed to pay and did pay the fair market value of the helicopter which was totally destroyed in a crash, the Board held that payment by the Government was performance and not a breach on its part and that the contractor was not entitled to loss of profits on a breach of contract theory.

Appeal of Gay Airways, Inc., IBCA-1429-2-81 (Mar. 9, 1984) 91 I.D. 149

Contracting Officer

In appeal for recovery of overrun costs in a cost reimbursement/sharing contract is denied where the contractor failed to provide sufficient, reliable information on the status of expenditures for the contracting officer reasonably to conclude that there was an overrun and though the contracting officer urged further performance, that urging was not an inducement to overrun, because it invariably applied to performance only up to the point of exhaustion of funds and was consistently accompanied by an admonition to the contractor to be guided by the contract's limitation of costs clause.

Appeal of MTL Systems, Inc., IBCA-1648-1-83 (Sept. 19, 1984) 91 I.D.

Differing Site Conditions (Changed Conditions)

Where it was found: That the Government designated in the contract documents a specific site as the source of aggregate for use in a road construction project; that the contractor relied on the contract data indicating that such source contained sufficient conforming material to satisfy the contract requirements; and that the actual subsurface conditions differed materially from the conditions indicated by the contract drawings and from the expectations of persons familiar with the source, the Board concludes that the contractor is entitled to an equitable adjustment under a Category I Differing Site Condition theory.

Appeal of Wylie Brothers Contracting Co., IBCA-1175-11-77 (Jan. 27, 1984) 91 I.D. 51

The Board finds that no differing site condition existed despite allegations of excessive water impeding excavation and construction of a pipeline resulting from artesian flows where the contract indications clearly showed some artesian conditions to be expected, and required the contractors dewatering plan to be approved; and where the contractor did not implement his plan to dewater and the same plan was effective to allow completion of the project by a Government force account crew.

Appeal of Frank Rivera, Inc., IBCA-1621-9-82 (May 10, 1984)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications

The Board concludes that the specifications under a Government construction contract for the rental of draglines with operators are defective where it finds (i) that the terms of the solicitation respecting supervision were ambiguous; (ii) that the interpretation the contractor placed upon the ambiguous provisions was reasonable, as evidenced by the Government's concurrence in such interpretation prior to the time a dispute arose; (iii) that the bifurcation of authority between the COR at the jobsite and the refuge manager some 35 miles away continued for at least several months after the issuance of the notice to proceed; and (iv) that confusion over who was responsible for supervision and the manner in which it was exercised seriously delayed the contractor and resulted in the partnership incurring substantial additional expenses.

Where under a construction contract for the rental of draglines with operators the responsibility of the Government for delays to the contract work was clearly established but as a result of the contractor's foreman having failed to record in his diary some of the significant events affecting the time and effect of Government actions causing delay and the contractor having failed to segregate costs applicable to the constructive change, it was not possible to determine with reasonable certainty the extent to which the Government's actions increased the costs of contract performance, the amount of the equitable adjustment to which the contractor is entitled was determined by resort to what has been characterized as the jury verdict approach.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Duty to Inquire

In an earlier decision in the context of a contract ambiguity, the Board ruled in the contractor's favor on the costs of supplying certain building components and against the contractor on the costs of installing them. On reconsideration, the contractor convinced the Board that the analogy relied upon in denying the appeal for installation costs was fallacious, but, in reviewing all aspects of the decision on reconsideration, the Board discovered that its rationale for granting any relief on the issue of supplying and installing the components was also erroneous, and therefore affirmed its denial of installation costs and reversed its grant of supply costs. Where there is a patent ambiguity between contract provisions and a contractor fails to make inquiry about it, the contractor may not rely on its interpretation if the Government interpretation differs and will not be allowed to prevail for any alleged extra costs for complying with directions consistent with the Government's interpretation.

Appeal of C. G. Norton Co. (On Reconsideration), IBCA-1647-1-83 (Apr. 23, 1984)

Estimated Quantities

Rejected by the Board is an appellant's argument that the Government had in effect guaranteed to the contractor that he would be paid any specified number of hours per week where the Board found (i) that the requirement that the contractor work a 40-hour week was qualified by the language "weather and ground conditions permitting"; (ii) that the Government consent to the contractor working 50 hours a week was subject

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Estimated Quantities--Continued

to the same limiting language; and (iii) that the evidence showed that some of the delays experienced by the contractor in proceeding with the contract work were attributable to rain (i.e., weather and ground conditions) for which the Government was not responsible.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

General Rules of Construction

Where for over half the duration of the contract performance period the contractor routinely submitted direct billings for holiday pay, and the responsible Government official approved and certified them, and payment was made to the contractor, the Board finds that such conduct by the parties prior to the onset of a dispute, is entitled to great weight in determining that the contract did not contain overhead rates for holiday pay.

Moving Services, Ltd., IBCA-1540-12-81 (Apr. 9, 1984)

Intent of Parties

Rejected by the Board is an appellant's argument that the Government had in effect guaranteed to the contractor that he would be paid any specified number of hours per week where the Board found (i) that the requirement that the contractor work a 40-hour week was qualified by the language "weather and ground conditions permitting"; (ii) that the Government consent to the contractor working 50 hours a week was subject to the same limiting language; and (iii) that the evidence showed that some of the delays experienced by the contractor in proceeding with the contract work were attributable to rain (i.e., weather and ground conditions) for which the Government was not responsible.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Notices

The 20-day notice provision of the Changes clause is inapplicable where the Board finds the specification to be defective, thereby bringing the case within the defective specification exceptions to the notice requirement of the Changes clause.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

A Government motion to dismiss an appeal is denied where the Board determines that it has jurisdiction over an appeal being actively prosecuted by a subcontractor where it finds the prime contractor's sponsorship of the subcontractor's claim is established by the following: (1) The decision from which the appeal was taken was addressed to the prime contractor; (2) the notice of appeal was signed by a representative of the contractor; and (3) the contractor is claiming overhead and profit on the subcontractor's claim.

Appeal of Ohkayashi-Gumi, Ltd., IBCA-1785-3-84 (Sept. 25, 1984) 91 I.D.

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Privity of Contract

A Government motion to dismiss an appeal is denied where the Board determines that it has jurisdiction over an appeal being actively prosecuted by a subcontractor where it finds the prime contractor's sponsorship of the subcontractor's claim is established by the following: (1) The decision from which the appeal was taken was addressed to the prime contractor; (2) the notice of appeal was signed by a representative of the contractor; and (3) the contractor is claiming overhead and profit on the subcontractor's claim.

Appeal of Ohbayashi-Gumi, Ltd., IBCA-1785-3-84 (Sept. 25, 1984) 91 I.D.

Subcontractors and Suppliers

A Government defense that the Board is without jurisdiction over a subcontractor's claim is rejected where it is found that the subcontractor's claim was included in the appellant's initial claim submission and that at the hearing appellant actively prosecuted the claim on behalf of the subcontractor by eliciting testimony not only from a representative of the subcontractor but from appellant's foreman as well.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984)

A Government motion to dismiss an appeal is denied where the Board determines that it has jurisdiction over an appeal being actively prosecuted by a subcontractor where it finds the prime contractor's sponsorship of the subcontractor's claim is established by the following: (1) The decision from which the appeal was taken was addressed to the prime contractor; (2) the notice of appeal was signed by a representative of the contractor; and (3) the contractor is claiming overhead and profit on the subcontractor's claim.

Appeal of Ohbayashi-Gumi, Ltd., IBCA-1785-3-84 (Sept. 25, 1984) 91 I.D.

CONTRACT DISPUTES ACT OF 1978

Interest

In an equitable adjustment case, the Board finds that an appellant is entitled to simple interest on the amount found to be due and that under the provisions of the Contract Disputes Act the amount of interest is to be determined on the basis of applying variable rates for the period over which interest is payable with interest not to commence until the contractor has submitted its claim to the contracting officer for decision.

Appeal of Ohbayashi-Gumi, Ltd., IBCA-1785-3-84 (Sept. 25, 1984) 91 I.D.

Jurisdiction

Although the Contract Disputes Act gives the Board jurisdiction over breach of contract claims, the Board finds that claims presented subsequent to a direction by the Government to cease all work under a contract are not redressable as breach of contract claims where (i) the contract includes a termination for the convenience of the Government clause; (ii) the lack of funds to pay the contractor for further work constituted an adequate cause for directing performance under the contract to cease; (iii) that the failure of the contracting officer to invoke the termination for convenience clause as the basis for his action does not affect the right to rely upon that clause in determining the rights and obligations of the parties; (iv)

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

that the presence in the contract of a termination for convenience clause precludes actions of the Government from being considered breaches of contract (assuming they might otherwise be); and (v) that the inclusion of a termination for convenience clause makes the recovery of anticipated profits unallowable.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Timely filing of an appeal under the Contract Disputes Act of 1978 is jurisdictional and an appeal filed after the expiration of the 90-day period allowed by the Act is dismissed since the Board has no jurisdiction to consider an untimely filed appeal.

Appeal of Columbia Engineering Corp., IBCA-1776-2-84 (Feb. 29, 1984)

DISPUTES AND REMEDIES

Burden of Proof

Termination of a contract for default was proper where the Government offered sufficient evidence to demonstrate that the contractor failed to perform the requirements of the contract, and the contractor offered no evidence to sustain its burden of showing the default was excusable.

Major Construction Corp., IBCA-1688-6-83 (Jan. 9, 1984)

Where three of four extra work orders covering drilling and blasting work performed by a subcontractor provided for no reimbursement to the contractor and where the fourth extra work order was used as a vehicle to reimburse the contractor for the rental of its pumps at agreed upon rates without any evidence having been offered at the hearing to show that any amounts was included therein for costs resulting from delays to the contractor's work, the Government's contention that the contractor's acceptance of the four extra work orders constituted an accord and satisfaction is rejected by the Board since it is well settled that an agreement does not operate as an accord as to matters not covered by the agreement.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

A contractor was allowed to recover holiday pay expenses as a fringe labor cost under a fixed rate, indefinite quantity contract because it sustained its burden of proof that holiday pay was excluded from overhead rates as an indirect cost, and that the contractor's direct billing for holiday pay did not result in a duplicate recovery of such costs.

Moving Services, Ltd., IBCA-1540-12-81 (Apr. 9, 1984)

In an appeal from a termination for default where the contractor's theory of the case is defective specifications, it is the contractor's burden to show not only that the specifications were faulty but that the faulty specifications caused the condition from which termination resulted. Upon finding that although the contractor showed that a Government well was incapable of producing the precise flow by total dynamic head set out in the contract specifications under which a particular pump was supplied, but finding

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

that the Government established that the pump should have operated adequately under the actual flow conditions the well was capable of producing, the Board holds that the Government effectively controverted the contractor's case, that the contractor failed to sustain its burden of proof, and that the termination for default was justified entitling the Government to prevail.

Appeal of W. Hickey Co., Inc., IBCA-1574-4-82 (Apr. 20, 1984) 91 I.D. 186

In a case where the parties differ as to the amount of equitable adjustment to be provided for a constructive change, the Board finds the appellant to have shown by a preponderance of the evidence that it is entitled to the amount of the equitable adjustment sought.

Appeal of Ohbayashi-Gumi, Ltd., IBCA-1785-3-84 (Sept. 25, 1984) 91 I.D.

Damages

Generally

In a case involving a denial of a claim for impaired bonding capacity damages, the board noted that it considered (i) that damages of this nature were precluded by a termination for convenience article being included in the contract and (ii) that appellant had failed to show that the loss of profit claimed on other contracts was the inevitable result of the Government having delayed performance of the contract work by approximately 4 months, after which the Board found that appellant was not entitled to prevail in any event since the record contained no evidence showing particular contracts not bid upon or successfully bid upon but denied because of inability to obtain a bond.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Where a contractor leased a helicopter to the Government, but before the end of the lease period, the helicopter was destroyed, the Board found that the inability or unwillingness of the contractor upon demand to furnish a replacement helicopter for the remainder of lease period constituted nonperformance of a contractual obligation on the part of the contractor and held that such nonperformance relieved the Government from payment for any contractually guaranteed minimum use of the aircraft.

Where a contract for the lease of a helicopter by the Government contained a Loss or Damage to Leased Aircraft clause whereby the Government assumed the risk of loss and agreed to pay and did pay the fair market value of the helicopter which was totally destroyed in a crash, the Board held that payment by the Government was performance and not a breach on its part and that the contractor was not entitled to loss of profits on a breach of contract theory.

Appeal of Gay Airways, Inc., IBCA-1429-2-81 (Mar. 9, 1984) 91 I.D. 149

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments

Upon finding that the contractor's continuous performance in the early stages of a road construction project was substantially disrupted by the Government because of grade and slope revisions resulting in delayed delivery of a final structures list, the Board holds that a constructive change occurred entitling appellant to an equitable adjustment for resulting extra costs.

Where it was found: That the Government designated in the contract documents a specific site as the source of aggregate for use in a road construction project; that the contractor relied on the contract data indicating that such source contained sufficient conforming material to satisfy the contract requirements; and that the actual subsurface conditions differed materially from the conditions indicated by the contract drawings and from the expectations of persons familiar with the source, the Board concludes that the contractor is entitled to an equitable adjustment under a Category I Differing Site Condition theory.

In its quantum consideration, after finding entitlement to equitable adjustments, the Board allowed amounts claimed by the contractor for depreciation, and improperly withheld by the Government for liquidated damages. It approved the claimed rate of profit disallowed by the Government auditor and the bulk of the audited total costs. However, the Board disallowed a claim for the increased price of asphalt upon finding a failure of proof that either the contractor or its supplier paid or incurred increased costs for asphalt, and, disallowed a claim for costs attributed to a winter shutdown upon finding that the contractor had agreed that such shutdown would be at no additional cost to the Government. Upon finding some fault with the Government audit upon which the contractor based its total cost theory of recovery, and dissatisfaction with the accuracy or specificity available for a precise calculation of certain other costs claimed, as well as with the contractor's proposed formula for calculating costs per day for days of delay, the Board determines that application of the jury verdict approach is both practicable and reasonable in arriving at the equitable adjustment award to the contractor.

Appeal of Wylie Brothers Contracting Co., IBCA-1175-11-77 (Jan. 27, 1984) 91 I.D. 51

In a case involving a claim for equipment idled as a result of delays attributed to the Government, the Board found that the rates for idle equipment used in the claim were in excess of the rate derived from applying the regularly invoked rule that the reasonable value of standby equipment is 50 percent of operating equipment rates.

A claim involving idle equipment, which the Board finds not to be cognizable as a breach of contract claim is found to constitute a claim falling within the purview of the standard Changes clause and reimbursable thereunder. In this connection it is noted that the Board is not limited by the appellant's choice of remedies or by the Government's assignment of defense.

Where under a construction contract for the rental of draglines with operators the responsibility of the Government for delays to the contract work was clearly established but as a result of the contractor's foreman having failed to record in his diary some of the significant events affecting the time and effect of Government actions causing delay and the contractor having failed to segregate costs applicable to the constructive change, it was not possible to determine with reasonable certainty the extent to which the Government's actions increased the costs of contract performance, the amount of the equitable adjustment to which the contractor is entitled was determined by resort to

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

what has been characterized as the jury verdict approach.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

A contractor was allowed to recover holiday pay expenses as a fringe labor cost under a fixed rate, indefinite quantity contract because it sustained its burden of proof that holiday pay was excluded from overhead rates as an indirect cost, and that the contractor's direct billing for holiday pay did not result in a duplicate recovery of such costs.

Boring Services, Ltd., IBCA-1540-12-81 (Apr. 9, 1984)

In a case where the parties differ as to the amount of equitable adjustment to be provided for a constructive change, the Board finds the appellant to have shown by a preponderance of the evidence that it is entitled to the amount of the equitable adjustment sought.

Appeal of Obbayashi-Gumi, Ltd., IBCA-1785-3-84 (Sept. 25, 1984) 91 I.D.

Jurisdiction

A claim involving idle equipment, which the Board finds not to be cognizable as a breach of contract claim is found to constitute a claim falling within the purview of the standard Changes clause and reimbursable thereunder. In this connection it is noted that the Board is not limited by the appellant's choice of remedies or by the Government's assignment of defense.

A Government defense that the Board is without jurisdiction over a subcontractor's claim is rejected where it is found that the subcontractor's claim was included in the appellant's initial claim submission and that at the hearing appellant actively prosecuted the claim on behalf of the subcontractor by eliciting testimony not only from a representative of the subcontractor but from appellant's foreman as well.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Upon finding no statute or contractual agreement between the parties providing for the same, the Board denied appellant's claims for interest, attorney fees and costs.

Appeal of Gay Airways, Inc., IBCA-1429-2-81 (Mar. 9, 1984) 91 I.D. 149

A Government motion to dismiss an appeal is denied where the Board determines that it has jurisdiction over an appeal being actively prosecuted by a subcontractor where it finds the prime contractor's sponsorship of the subcontractor's claim is established by the following: (1) The decision from which the appeal was taken was addressed to the prime contractor; (2) the notice of appeal was signed by a representative of the contractor; and (3) the contractor is claiming overhead and profit on the subcontractor's claim.

Appeal of Obbayashi-Gumi, Ltd., IBCA-1785-3-84 (Sept. 25, 1984) 91 I.D.

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Substantial Evidence

Rejected by the Board is an appellant's argument that the Government had in effect guaranteed to the contractor that he would be paid any specified number of hours per week where the Board found (i) that the requirement that the contractor work a 40-hour week was qualified by the language "weather and ground conditions permitting"; (ii) that the Government consent to the contractor working 50 hours a week was subject to the same limiting language; and (iii) that the evidence showed that some of the delays experienced by the contractor in proceeding with the contract work were attributable to rain (i.e., weather and ground conditions) for which the Government was not responsible.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

Termination for Convenience

The Board of Contract Appeals has no authority to award a contract and in an appeal from a termination for default may do no more than review the contracting officer's conduct leading to the termination action and affirm the termination if that conduct is found to be valid or convert the termination to a termination for the convenience of the Government.

Hosex, IBCA-1649-1-83 (Jan. 30, 1984)

Although the Contract Disputes Act gives the Board jurisdiction over breach of contract claims, the Board finds that claims presented subsequent to a direction by the Government to cease all work under a contract are not redressable as breach of contract claims where (i) the contract includes a termination for the convenience of the Government clause; (ii) the lack of funds to pay the contractor for further work constituted an adequate cause for directing performance under the contract to cease; (iii) that the failure of the contracting officer to invoke the termination for convenience clause as the basis for his action does not affect the right to rely upon that clause in determining the rights and obligations of the parties; (iv) that the presence in the contract of a termination for convenience clause precludes actions of the Government from being considered breaches of contract (assuming they might otherwise be); and (v) that the inclusion of a termination for convenience clause makes the recovery of anticipated profits unallowable.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

A Government motion to dismiss a claim for lost profits and an alternative motion for partial summary judgment on the lost profit claim are both denied in a case where appellant implies that the actions of the contracting officer were in bad faith and asserts that the actions of the contracting officer during the administration of the contract were arbitrary, capricious, and unreasonable. In denying both motions, the Board notes that there are some limited circumstances in which the damages recoverable have not been restricted to those specified in the termination for convenience clause and that at the requested oral hearing, appellant will be afforded the opportunity to prove bad faith or abuse of discretion on the part of the contracting officer such as might avoid the recovery limitations of the convenience-termination clause.

Appeal of Allan P. Sarvis, IBCA-1690-6-83 (May 17, 1984) 91 I.D. 253

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Default

Generally

Termination of a contract for default was proper where the Government offered sufficient evidence to demonstrate that the contractor failed to perform the requirements of the contract, and the contractor offered no evidence to sustain its burden of showing the default was excusable.

Major Construction Corp., IBCA-1688-6-83 (Jan. 9, 1984)

The Board of Contract Appeals has no authority to award a contract and in an appeal from a termination for default may do no more than review the contracting officer's conduct leading to the termination action and affirm the termination if that conduct is found to be valid or convert the termination to a termination for the convenience of the Government.

Where a contractor (1) failed to comply with a notice to proceed within the time therefor as stated in the notice, (2) by its conduct established a likelihood of future inability to proceed such as would support a conclusion of anticipatory breach, and (3) was so dilatory in performance that a belief that the contract could not be completed timely was reasonable, the Board concluded that the contracting officer had a corresponding number of independent, valid reasons for terminating the contract for default.

Honex, IBCA-1649-1-83 (Jan. 30, 1984)

In an appeal from a termination for default where the contractor's theory of the case is defective specifications, it is the contractor's burden to show not only that the specifications were faulty but that the faulty specifications caused the condition from which termination resulted. Upon finding that although the contractor showed that a Government well was incapable of producing the precise flow by total dynamic head set out in the contract specifications under which a particular pump was supplied, but finding that the Government established that the pump should have operated adequately under the actual flow conditions the well was capable of producing, the Board holds that the Government effectively controverted the contractor's case, that the contractor failed to sustain its burden of proof, and that the termination for default was justified entitling the Government to prevail.

Appeal of W. Hickey Co., Inc., IBCA-1574-4-82 (Apr. 20, 1984) 91 I.D. 186

The Board found that termination of a contract for default was proper where the contractor failed to complete contract performance on time because of a failure to investor the excavation and abandoned the contract work because of an alleged differing site condition of excessive artesian water, which was effectively dewatered using the same plan during a later season of greater subsurface flows.

Appeal of Frank Rivera, Inc., IBCA-1621-9-82 (May 10, 1984)

CONTRACTS--Continued

PERFORMANCE OR DEFAULT

Generally

Where a contractor leased a helicopter to the Government, but before the end of the lease period, the helicopter was destroyed, the Board found that the inability or unwillingness of the contractor upon demand to furnish a replacement helicopter for the remainder of lease period constituted nonperformance of a contractual obligation on the part of the contractor and held that such nonperformance relieved the Government from payment for any contractually guaranteed minimum use of the aircraft.

Where a contract for the lease of a helicopter by the Government contained a Loss or Damage to Leased Aircraft clause whereby the Government assumed the risk of loss and agreed to pay and did pay the fair market value of the helicopter which was totally destroyed in a crash, the Board held that payment by the Government was performance and not a breach on its part and that the contractor was not entitled to loss of profits on a breach of contract theory.

Appeal of Gay Airways, Inc., IBCA-1429-2-81 (Mar. 9, 1984) 91 I.D. 149

Breach

Where a contractor (1) failed to comply with a notice to proceed within the time therefor as stated in the notice, (2) by its conduct established a likelihood of future inability to proceed such as would support a conclusion of anticipatory breach, and (3) was so dilatory in performance that a belief that the contract could not be completed timely was reasonable, the Board concluded that the contracting officer had a corresponding number of independent, valid reasons for terminating the contract for default.

Honex, IBCA-1649-1-83 (Jan. 30, 1984)

Release and Settlement

Where three of four extra work orders covering drilling and blasting work performed by a subcontractor provided for no reimbursement to the contractor and where the fourth extra work order was used as a vehicle to reimburse the contractor for the rental of its pumps at agreed upon rates without any evidence having been offered at the hearing to show that any amount was included therein for costs resulting from delays to the contractor's work, the Government's contention that the contractor's acceptance of the four extra work orders constituted an accord and satisfaction is rejected by the Board since it is well settled that an agreement does not operate as an accord as to matters not covered by the agreement.

Appeal of Clark & Hirt, IBCA-1508-8-81 (Feb. 9, 1984) 91 I.D. 71

CONVEYANCES

GENERALLY

Where a stranger to the original patentee acquires a certain, specific tract of land through mesne conveyances and then seeks to have the patent amended so that he can acquire other land instead, he must demonstrate first that there was an error in the patent's land description and, second, that he is deserving

CORRELATIVES--Continued

GENERALLY--Continued

as a matter of equity and justice to be granted that which was actually earned by the original patentee.

George Val Snow (On Judicial Remand), 79 IBLA 261 (Mar. 7, 1984)

Under sec. 316 of the Federal Land Policy and Management Act of 1976, the Secretary of the Interior has discretionary authority to correct an error in a conveyance document when the error is clearly established and equitable considerations dictate that relief be granted. BLM's rejection of an application to amend a homestead patent to include additional acreage will be affirmed where the record does not support a finding that the original patentees had entered those lands, nor was there ever any intent to enter such lands as part of the original homestead entry.

Elmer L. Lowe, 80 IBLA 101 (Apr. 3, 1984)

Legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Inyo National Forest pursuant to sec. 315 of the Act of Oct. 21, 1976, which parcel was deeded to the Government in 1899 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land to the United States as part of the national forest in which the lands are located.

Holly D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

DESERT LAND ENTRY

GENERALLY

Analysis of the economic feasibility of proposed reclamation of desert land is an acceptable factor for BLM to consider when reviewing, pursuant to 43 CFR 2520.0-8(d)(3), whether a desert land entry application may be allowed in the form sought.

Where BLM uses a computerized economic analysis to justify rejection of a desert land entry application, BLM must explain the basis of its analysis and the deficiencies of the applicant's proposal in its decision so that the applicant has some basis for understanding and accepting the rejection or appealing and disputing it. Sufficient facts and explanations to support the decision must be present before the Board will affirm such a decision on appeal.

David V. Dix, 81 IBLA 58 (May 22, 1984)

APPLICATIONS

A desert land entry application is properly rejected where the applicant fails to provide evidence of a water right or that he has initiated, so far as then possible, appropriate steps looking to the acquisition of such a water right.

James Neil Fletcher, 78 IBLA 330 (Jan. 24, 1984)

DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

An application for desert land entry is properly rejected where the applicant proposes to irrigate his entry from underground water sources, but fails to show that he has acquired a right from the state to appropriate underground water or that he has taken appropriate steps, as far as then possible, toward acquisition of such a right.

Richard H. Greener, 79 IBLA 234 (Feb. 29, 1984)

A desert land entry application is properly rejected where the applicant proposes to irrigate his entry from underground water sources, but fails to show at the time of filing his application that he has acquired a right from the State to appropriate underground water or that he has taken appropriate steps, as far as then possible, looking to the acquisition of such a right.

Elmer A. Kubler, 80 IBLA 283 (May 4, 1984)

Dale Christiansen, 82 IBLA 97 (July 23, 1984)

Rejection of a desert land entry application will be set aside where the applicant has alleged facts which, if proved, would result in a different conclusion.

David V. Dix, 81 IBLA 58 (May 22, 1984)

The failure of a desert land entry applicant to promptly notify the authorizing BLM officer of a change of address does not, in itself, constitute an adequate basis for rejecting the application.

Keith L. McCabe, Jr., 81 IBLA 314 (June 18, 1984)

A desert land entry application is properly rejected where the applicant fails to provide evidence of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right.

Lee A. Fite, Gregory Fite, 82 IBLA 1 (July 2, 1984)

A desert land entry application is properly rejected where the applicant is relying for a source of water on a water permit application which has been canceled by the state water authority, since a desert land entry application without evidence of a water right must be rejected.

Robert E. White et al., 82 IBLA 34 (July 10, 1984)

WATER RIGHT

A desert land entry application is properly rejected where the applicant fails to provide evidence of a water right or that he has initiated, so far as then possible, appropriate steps looking to the acquisition of such a water right.

James Neil Fletcher, 78 IBLA 330 (Jan. 24, 1984)

DESERT LAND ENTRY--Continued

WATER RIGHT--Continued

An application for desert land entry is properly rejected where the applicant proposes to irrigate his entry from underground water sources, but fails to show that he has acquired a right from the state to appropriate underground water or that he has taken appropriate steps, as far as then possible, toward acquisition of such a right.

Richard W. Greener, 79 IBLA 234 (Feb. 29, 1984)

A desert land entry application is properly rejected where the applicant proposes to irrigate his entry from underground water sources, but fails to show at the time of filing his application that he has acquired a right from the State to appropriate underground water or that he has taken appropriate steps, as far as then possible, looking to the acquisition of such a right.

Elmer A. Kubler, 80 IBLA 283 (May 4, 1984)

Dale Christiansen, 82 IBLA 97 (July 23, 1984)

A desert land entry application is properly rejected where the applicant fails to provide evidence of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right.

Lee A. Fite, Gregory Fite, 82 IBLA 1 (July 2, 1984)

A desert land entry application is properly rejected where the applicant is relying for a source of water on a water permit application which has been canceled by the state water authority, since a desert land entry application without evidence of a water right must be rejected.

Robert E. White et al., 82 IBLA 34 (July 10, 1984)

ENDANGERED SPECIES ACT OF 1973

SECTION 7

Generally

BLM may, in its discretion, reject any offer to lease Federal lands for oil and gas upon a determination supported by facts of record that leasing would not be in the public interest, e.g., where leasing might adversely affect the Yuma clapper rail, a federally listed endangered species.

Where BLM rejects an oil and gas lease offer, in order to protect a federally listed endangered species, the record should ordinarily reflect consideration of whether leasing subject to protective stipulations, including no surface occupancy, would not adequately serve the public interest. Where the record indicates that BLM failed to consider alternatives to no leasing, the case will be remanded to BLM for such an assessment.

BLM may properly reject an oil and gas lease offer in order to protect a federally listed endangered species pending the availability of further studies of the effect of oil and gas exploration and development on a resident population of that species.

Chevron U.S.A., Inc., 80 IBLA 324 (May 8, 1984)

ENVIRONMENTAL POLICY ACT

Where the Bureau of Land Management assesses the cumulative impacts of approving multiple permits to drill for oil and gas in a wilderness study area and wild horse range and makes an area-wide determination to permit such oil and gas development because it would have no significant effect on the area, an appeal of that determination challenging the adequacy of the environmental assessment of the cumulative impacts is not premature.

Apinal Protection Institute of America, Sierra Club, Colorado Open Space Council, 79 IBLA 94 (Feb. 17, 1984) 91 I.D. 115

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes environmental problems have been considered, relevant areas of environmental concern have been identified, and the determination is reasonable.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984) 91 I.D. 165

ENVIRONMENTAL QUALITY

ENVIRONMENTAL STATEMENTS

Protest to a decision to implement a management and/or control program for black-tailed prairie dogs is properly denied where the decision is based on an environmental assessment which reflects an evaluation of the environmental impacts sufficient to support an informed judgment.

Defenders of Wildlife, 79 IBLA 62 (Feb. 13, 1984)

Where the Bureau of Land Management assesses the cumulative impacts of approving multiple permits to drill for oil and gas in a wilderness study area and wild horse range and makes an area-wide determination to permit such oil and gas development because it would have no significant effect on the area, an appeal of that determination challenging the adequacy of the environmental assessment of the cumulative impacts is not premature.

Apinal Protection Institute of America, Sierra Club, Colorado Open Space Council, 79 IBLA 94 (Feb. 17, 1984) 91 I.D. 115

The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1976), requires preparation of an environmental impact statement whenever a proposed major Federal action will significantly affect the quality of the human environment.

The test for determining the extent to which treatment of a subject in an environmental impact statement for a multistage project may be deferred depends on two factors: (1) whether obtaining more detailed useful information is "meaningfully possible" at the time when the environmental impact statement for an earlier stage is prepared, and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project.

Where a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as a result of information not presently available, and where the Government reserves

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

the power to make such modification or change thereafter, deferment of analysis of that unavailable information does not violate the National Environmental Policy Act.

When a proposed action is a critical agency decision which will result in irreversible and irretrievable commitments of resources to an action which will produce a significant impact on the environment, an environmental impact statement is required.

Sierra Club, The Mono Lake Committee, 79 IBLA 240 (Mar. 1, 1984)

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes environmental problems have been considered, relevant areas of environmental concern have been identified, and the determination is reasonable.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984) 91 I.D. 165

Where application is made for suspension of unitized oil and gas leases in order to preserve them from expiration pending approval of an application for permission to drill, and where the suspension is granted at the discretion of the authorized officer on condition that permission to drill may be denied upon a finding that drilling operations would result in unacceptable impacts on the wilderness characteristics of the area, an environmental impact statement on the effects of such drilling which fails to consider the alternative of refusing permission to drill is an inadequate basis for a decision to persit drilling.

Sierra Club et al. (On Judicial Remand), 80 IBLA 251 (May 2, 1984)

Where an administrative decision is made that a proposed action is not a major Federal action which will significantly affect the quality of the human environment, so that an environmental impact statement need not be filed, that decision will be affirmed on review if it appears to be the reasonable conclusion of a proper and sufficient environmental analysis compiled according to established procedures and it was made by an authorized officer, in good faith, based upon such record.

United States v. Albert O. Hugman et al., 81 IBLA 271 (June 8, 1984)

A decision to implement a vegetative management program with herbicide spraying will be reversed where it is based on an environmental assessment which fails to include a "worst case" evaluation of the environmental impacts of the proposed program, and where the record fails to document effects upon the environment of the proposed spraying program.

Save Our ecoSystems, Inc., 81 IBLA 326 (June 19, 1984)

A decision to utilize the herbicide 2,4-D in a vegetation management program will be vacated where it is based on an environmental assessment which lacks

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

a worst case analysis and the record discloses uncertainty as to the effect of the herbicide on the human environment.

Sierra Club, Grand Canyon Chapter, Arizona, 81 IBLA 352 (June 25, 1984)

A decision to utilize herbicides including 2,4-D in a vegetation management program will be vacated where it is based on an environmental assessment which lacks a worst case analysis and the record discloses uncertainty regarding the effect of the herbicides on the human environment.

Although a worst case analysis may be performed in the context of an environmental assessment prepared to supplement a programmatic environmental impact statement, the environmental assessment becomes the functional equivalent of an environmental impact statement and the minimum 45-day comment period for a draft environmental impact statement is applicable.

Applegate Citizens Opposed to Toxic Sprays (ACOTS), Southern Oregon Citizens Against Toxic Sprays (SOCATS), 81 IBLA 398 (June 29, 1984)

Denial of a protest of a determination to proceed with a private exchange will be vacated and the case remanded where the record fails to reflect an evaluation of the environmental impacts sufficient to support an informed judgment.

Where the record shows that missing information is material to an agency decision on a private land exchange, it must be gathered and included in an environmental assessment. Only where the costs of obtaining the information are exorbitant or the means of obtaining it are beyond the state of the art must the agency weigh the need for the action against the risk and severity of possible adverse impacts of proceeding in the face of uncertainty. And only in the case of a determination to proceed in the face of uncertainty must a worst case analysis be conducted in accordance with 40 CFR 1502.22.

National Wildlife Federation, 82 IBLA 303 (Sept. 5, 1984)

A management plan decision for the Yaquina Head Outstanding Natural Area implementing actions to remove various structures and develop a visitors center and to impose restrictions on hang gliding will be affirmed on appeal where the decision is based on an environmental assessment which reflects an evaluation of reasonable alternatives and is sufficient to support an informed judgment. Such a determination may not be overcome by a mere difference of opinion.

Oregon Shores Conservation Coalition, Bruce Waugh, 83 IBLA 1 (Sept. 17, 1984)

HERBICIDES

A decision to implement a vegetative management program with herbicide spraying will be reversed where it is based on an environmental assessment which fails to include a "worst case" evaluation of the environmental impacts of the proposed program, and where the record fails to document effects upon the environment of the proposed spraying program.

Save Our ecoSystems, Inc., 81 IBLA 326 (June 19, 1984)

ENVIRONMENTAL QUALITY--Continued

HERBICIDES--Continued

A decision to utilize the herbicide 2,4-D in a vegetation management program will be vacated where it is based on an environmental assessment which lacks a worst case analysis and the record discloses uncertainty as to the effect of the herbicide on the human environment.

Sierra Club, Grand Canyon Chapter, Arizona, 81 IBLA 352 (June 25, 1984)

A decision to utilize herbicides including 2,4-D in a vegetation management program will be vacated where it is based on an environmental assessment which lacks a worst case analysis and the record discloses uncertainty regarding the effect of the herbicides on the human environment.

Although a worst case analysis may be performed in the context of an environmental assessment prepared to supplement a programmatic environmental impact statement, the environmental assessment becomes the functional equivalent of an environmental impact statement and the minimum 45-day comment period for a draft environmental impact statement is applicable.

Applegate Citizens Opposed to Toxic Sprays (ACOTS), Southern Oregon Citizens Against Toxic Sprays (SOCATS), 81 IBLA 398 (June 29, 1984)

EQUAL ACCESS TO JUSTICE ACT

GENERALLY

Although the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), may be characterized as a remedial statute, this does not support the proposition that it should be construed liberally. Every waiver of sovereign immunity is remedial, and statutes waiving sovereign immunity such as the Equal Access to Justice Act must be strictly construed.

An award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), is properly denied when the applicant is a corporation which fails to demonstrate that its net worth combined with that of its affiliates is not more than $5 million.

An application for an award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), is properly denied when special circumstances make an award unjust. An award is unjust when 49 percent of the applicant corporation's stock is held by one of the nation's largest companies which shares the production and operating costs with the majority shareholder in proportion to its percentage share of ownership.

Even though a party may have prevailed in an adversary proceeding, an award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), is properly denied where the position of the agency was substantially justified. In order to establish that its action was substantially justified, the Government is not required to establish that its decision to proceed was based on a substantial probability of prevailing. The standard was intended to ensure that the Government is not deterred from advancing in good faith a novel but credible interpretation of the law.

Kaycee Bentonite Corp., 79 IBLA 182 (Feb. 28, 1984)
91 I.D. 138

EQUAL ACCESS TO JUSTICE ACT--Continued

ADVERSARY ADJUDICATION

Under 5 U.S.C. § 504 (1982) and 43 CFR 4.603, 48 FR 17596 (Apr. 25, 1983), an adversary adjudication is one required by statute to be conducted by the Secretary under 5 U.S.C. § 554 (1982). Because there is no statutory requirement that a mining claim contest be conducted under 5 U.S.C. § 554 (1982), mining claim contests are not proceedings covered by Equal Access to Justice Act.

Kaycee Bentonite Corp., 79 IBLA 182 (Feb. 28, 1984)
91 I.D. 138

EQUITABLE ADJUDICATION

GENERALLY

Where a stranger to the original patentee acquires a certain, specific tract of land through mesne conveyances and then seeks to have the patent amended so that he can acquire other land instead, he must demonstrate first that there was an error in the patent's land description and, second, that he is deserving as a matter of equity and justice to be granted that which was actually earned by the original patentee.

George Val Snow (On Judicial Remand), 79 IBLA 261 (Mar. 7, 1984)

Where the claimant of a trade and manufacturing site substantially complies with the requirements of the Act of May 14, 1898, as amended, 43 U.S.C. §§ 687a-687a-6 (1982), and regulations promulgated pursuant to that Act, equitable adjudication may be invoked, however, where a claimant fails to comply with a requirement which is unrelated to the Act of May 14, 1898, and is jurisdictional in nature, equitable adjudication cannot properly be invoked.

Donna J. Waldtlow, 82 IBLA 247 (Aug. 28, 1984)

SUBSTANTIAL COMPLIANCE

Where the claimant of a trade and manufacturing site substantially complies with the requirements of the Act of May 14, 1898, as amended, 43 U.S.C. §§ 687a-687a-6 (1982), and regulations promulgated pursuant to that Act, equitable adjudication may be invoked, however, where a claimant fails to comply with a requirement which is unrelated to the Act of May 14, 1898, and is jurisdictional in nature, equitable adjudication cannot properly be invoked.

Donna J. Waldtlow, 82 IBLA 247 (Aug. 28, 1984)

ESTOPPEL

Where the record establishes that, but for the actions of the Department in improperly approving an exchange, a state would have properly exercised its exchange rights pursuant to applicable law, the Department will be estopped from subsequently asserting the exchange was improper where, as here, it would no longer be possible for the state to exercise its exchange rights.

State of Oregon et al., I, 78 IBLA 255 (Jan. 10, 1984)
91 I.D. 14

ESTOPPEL--Continued

Reliance on erroneous or incomplete information provided by Federal employees cannot create any rights not authorized by law.

Harriet C. Shaffel, 79 IBLA 228 (Feb. 29, 1984)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Lone Star Steel Co., 79 IBLA 345 (Mar. 22, 1984)

Viking Resources Corp., 80 IBLA 245 (Apr. 30, 1984)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision, since the individual is properly charged with knowledge of the true facts.

Tom Hurd, 80 IBLA 107 (Apr. 3, 1984)

The Department is not estopped to dismiss an appeal challenging the production royalty set in a competitive coal lease, where the appellant failed to protest the notice of the lease sale, by virtue of the Department's subsequent refusal to provide information essential to determining the validity of the challenged royalty.

Coastal States Energy Co., 80 IBLA 274 (May 4, 1984)

EVIDENCE

ADMISSIBILITY

Where a simultaneous oil and gas lease applicant, whose application has been rejected because it covers land within a known geologic structure, submits probative evidence contravening the determination that the land is presumptively productive of oil and gas, which is not fully rebutted, but where, nonetheless, questions of fact remain unresolved by the record, a hearing is appropriate to establish a sufficient record to permit decision.

Lloyd Chemical Sales, Inc., 82 IBLA 182 (Aug. 13, 1984)

BURDEN OF PROOF

When the Government contests the validity of a mining claim on the basis of lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which is sufficient to overcome the Government's showing on those issues raised.

Where the Government fails to present sufficient evidence to establish a prima facie case, the claimant need not present evidence in order to prevail. If a claimant, however, does present evidence, the determination of the validity of a claim must be made on the basis of the record as a whole, and not just a part of the record. A claimant need not affirmatively establish the existence of a discovery where there has been no prima facie case. The only risk that the claimant runs in such a situation is the risk that the evidence as a whole will establish by a preponderance

EVIDENCE--Continued

BURDEN OF PROOF--Continued

of the evidence that an element of discovery is not present.

United States v. Eva M. Pool et al., 78 IBLA 215 (Jan. 6, 1984)

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of materials defining the relationship between the priority applicant and its filing service, the applicant, as the party with peculiar means of knowledge enabling it to prove the nonexistence of such materials, has the burden of doing so. Failure to do so may give rise to an inference that the applicant's evidence is unfavorable.

Hal Carlson, Jr., 78 IBLA 333 (Jan. 24, 1984)

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of an agreement between the lessee as priority applicant and her assignee which would have resulted in a violation of 43 CFR 3102.2-6(a) and (b), the lessee is the party with peculiar means and knowledge enabling her to show the nonexistence of such agreement. Failure or refusal to do so may give rise to an inference that the lessee's evidence is unfavorable.

Patricia C. Alker, 79 IBLA 123 (Feb. 22, 1984)

A presumption of regularity supports the official acts of public officers and absent clear evidence to the contrary, it will be presumed that they have properly discharged their official duties. Suggestion that BLM may not have investigated a mining claimant's good faith in locating a claim which includes a water source is insufficient to rebut the presumption of regularity.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

Where a qualified expert, hired by mining claimants to evaluate contested claims, informs a Government mineral examiner that certain claims have no mineral values, the mineral examiner has no affirmative obligation to sample those claims. Testimony of the Government mineral examiner as to this conversation, unless impeached in cross-examination, is sufficient to establish a prima facie case that those claims are invalid.

United States v. Janet B. Copple et al., 81 IBLA 109 (May 35, 1984)

In a mining claim contest, the Government establishes a prima facie case of invalidity sufficient to shift the burden of proving otherwise to the claimant where the Government mineral examiner testifies that he has examined the claim and can find no evidence of mineralization or where he cannot examine the claim because it is covered with snow and ice.

United States v. Albert F. Parker et al., 82 IBLA 344 (Sept. 12, 1984) 91 I.D. 271

EVIDENCE--Continued

BURDEN OF PROOF--Continued

Implementation of the Taylor Grazing Act of 1934, as amended, is committed to the discretion of the Secretary of the Interior. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100.

Clyde G. Dorius, Douglas G. Bowd v. Bureau of Land Management, 83 IBLA 29 (Sept. 24, 1984)

PRESUMPTIONS

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of materials defining the relationship between the priority applicant and its filing service, the applicant, as the party with peculiar means of knowledge enabling it to prove the nonexistence of such materials, has the burden of doing so. Failure to do so may give rise to an inference that the applicant's evidence is unfavorable.

Hal Carlson, Jr., 78 IBLA 333 (Jan. 24, 1984)

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of an agreement between the lessee as priority applicant and her assignee which would have resulted in a violation of 43 CFR 3102.2-6(a) and (b), the lessee is the party with peculiar means and knowledge enabling her to show the nonexistence of such agreement. Failure or refusal to do so may give rise to an inference that the lessee's evidence is unfavorable.

Patricia C. Alker, 79 IBLA 123 (Feb. 22, 1984)

A presumption of regularity supports the official acts of public officers and absent clear evidence to the contrary, it will be presumed that they have properly discharged their official duties. Suggestion that BLM may not have investigated a mining claimant's good faith in locating a claim which includes a water source is insufficient to rebut the presumption of regularity.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

Where there is no evidence of receipt of a check in payment of the first year's advance rental pursuant to 43 CFR 3112.4-1(a) (1982), the presumption that BLM employees have properly discharged their duties and not lost or misplaced the check is not overcome by an affidavit executed by applicant which states that the check was enclosed in the same envelope with other documents received by BLM, which affidavit includes a copy of applicant's personal checkbook register showing a check was issued to BLM.

S. W. Partners, 80 IBLA 153 (Apr. 9, 1984)

PRIMA FACIE CASE

A prima facie case is made where sufficient evidence is presented to establish the essential facts. Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. It is not necessary to present evidence that is compelling, and the determination must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required

EVIDENCE--Continued

PRIMA FACIE CASE--Continued

for a prima facie case is the availability of the evidence and the difficulty which may reasonably be encountered in obtaining the evidence.

S & M Coal Co. & Jewell Smokeless Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 350 (Mar. 22, 1984) 91 I.D. 159

Where a qualified expert, hired by mining claimants to evaluate contested claims, informs a Government mineral examiner that certain claims have no mineral values, the mineral examiner has no affirmative obligation to sample those claims. Testimony of the Government mineral examiner as to this conversation, unless impeached in cross-examination, is sufficient to establish a prima facie case that those claims are invalid.

United States v. Janet E. Copple et al., 81 IBLA 109 (May 30, 1984)

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quality of the minerals insufficient to support a finding of discovery based on conventional methods of mining, a prima facie case is established. A contestee may overcome the prima facie case by probative evidence that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing the quality and quantity of minerals found by specialized mining methods.

United States v. Carl Dresselhaus et al., 81 IBLA 252 (June 8, 1984)

SUFFICIENCY

A presumption of regularity supports the official acts of public officers and absent clear evidence to the contrary, it will be presumed that they have properly discharged their official duties. Suggestion that BLM may not have investigated a mining claimant's good faith in locating a claim which includes a water source is insufficient to rebut the presumption of regularity.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

BLM may properly take immediate possession of wild free-roaming horses, in accordance with 43 CFR 4740.4-1(e), where there is sufficient evidence in terms of the physical condition of the animals and the credible reports of third parties that the animals are being inhumanely treated, i.e., that they lack necessary food and shelter, have failed to receive medical treatment, and are subject to substandard animal husbandry practices.

Kathryn E. Spring, 82 IBLA 25 (July 5, 1984)

Where an applicant for a trade and manufacturing site alleges that she timely mailed a notice of appeal of a decision setting forth estimated cost of survey but there is no evidence to indicate that it was ever received by the proper Bureau of Land Management office, the applicant must bear the consequences.

Donna J. Maidlow, 82 IBLA 247 (Aug. 28, 1984)

EVIDENCE--Continued

SUFFICIENCY--Continued

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. An oral hearing on a color-of-title application will be denied where there are no allegations of fact which would establish the color-of-title claim.

Kip C. Evans, 82 IBLA 319 (Sept. 6, 1984)

WEIGHT

Assay reports have limited probative value concerning the existence of a valuable mineral deposit on a mining claim when they are not supported by sufficient evidence to show how and where the samples were taken.

United States v. Albert F. Parker et al., 82 IBLA 344 (Sept. 12, 1984) 91 I.D. 271

EXCHANGES OF LAND

GENERALLY

A protest against approval of a proposed land exchange, pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1976), is properly dismissed where the protestant has not established that BLM did not adequately consider the public interest or that the lands exchanged are not of equal value.

Seven Star Ranch, Inc., 78 IBLA 366 (Jan. 30, 1984)

While there is no Departmental policy absolutely forbidding multiparty exchanges under sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1976), no such exchange can be approved unless the land ultimately acquired by the United States benefits a Federal natural resource management program.

Harry N. Bailey, 79 IBLA 362 (Mar. 23, 1984)

Where a national conservation organization challenges a Bureau of Land Management determination to proceed with a private exchange, that organization satisfies the requirements of 43 CFR 4.410 by establishing that it is a "party to a case" and that it is adversely affected because its membership uses the public land in question.

Denial of a protest of a determination to proceed with a private exchange will be vacated and the case remanded where the record fails to reflect an evaluation of the environmental impacts sufficient to support an informed judgment.

Where the record shows that missing information is material to an agency decision on a private land exchange, it must be gathered and included in an environmental assessment. Only where the costs of obtaining the information are exorbitant or the means of obtaining it are beyond the state of the art must the agency weigh the need for the action against the risk and severity of possible adverse impacts of proceeding in the face of uncertainty. And only in the case of a determination to proceed in the face of uncertainty must a worst case analysis be conducted in accordance with 40 CFR 1502.22.

National Wildlife Federation, 82 IBLA 303 (Sept. 5, 1984)

EXCHANGES OF LAND--Continued

FOREST EXCHANGES

Where a deed embracing certain base lands is tendered to the United States in an application for an exchange under the Forest Lieu Exchange Act, Act of June 4, 1897, 30 Stat. 11, which title is based on a deed issued for state school lands to a fictitious individual, such deed vests no title in the United States. Where, however, the state deed is issued to a real person, even though it may have been fraudulently obtained from the state, acceptance by the United States of the exchange application is sufficient to vest title in the United States to the base property, even though that title might be subject to defeasance in a proper proceeding.

Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 11, title to the base property vested in the United States. Such title was not divested by either the subsequent refusal of the United States to complete the exchange or by the acquisition of the selection rights emanating from the acceptance of the application by a third-party which had been defrauded of the base lands through the actions of the original applicant.

Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 11, which application was based on base lands fraudulently secured from a state, and the state subsequently obtained a quitclaim from the applicant of all his interest in the lands, the state did not regain title to the base lands but rather was vested with all selection rights which had properly appertained to the exchange application.

Where the record establishes that, but for the actions of the Department in improperly approving an exchange, a state would have properly exercised its exchange rights pursuant to applicable law, the Department will be estopped from subsequently asserting the exchange was improper where, as here, it would no longer be possible for the state to exercise its exchange rights.

Under the United States Supreme Court's decision in Wyoming v. United States, 255 U.S. 489 (1921), an application for a forest lieu exchange was accepted by the filing of a proper exchange and the acceptability of an exchange was to be judged as between the facts existing at the time of filing. The actual acceptance of an exchange application, however, even if based on a misapprehension of the facts, vested title to the offered lands in the United States.

The classification of land as Supplement A, B, or C, by the Oregon Supreme Court in Stay v. Hyde, 88 Or. 1, 169 P. 757 (1918), is not binding on the United States as to the factual predicates thereof, particularly as the United States was not a party to the case.

When a state obtained a quitclaim deed from a forest lieu applicant whose application had been accepted by the United States, the state merely acquired the same rights to complete the selection which were possessed by the original applicant. Where the state failed to record this forest lieu selection right under the Act of Aug. 5, 1955, 69 Stat. 534, or tender such right for payment under the Act of July 6, 1960, 74 Stat. 334, all rights flowing from the forest lieu selection right to either complete an exchange or have the base property reconveyed terminated.

While it is a general rule that adverse possession does not run against a state, this rule does not apply as against the United States. Where the United States has maintained open and notorious possession of certain parcels of land for over 80 years, the United States has acquired title to those parcels through adverse

EXCHANGES OF LAND--Continued

FOREST EXCHANGES--Continued

possession even though the record title holder was a state.

State of Oregon et al., I, 78 IBLA 255 (Jan. 10, 1984)
91 I.D. 14

FEDERAL EMPLOYEES AND OFFICERS

GENERALLY

When quarters rental rate appeals arise in remote areas where it is not practical to hold hearings, the parties have a special obligation to assist in the resolution of the appeal by prompt and detailed responses to the Board's inquiries concerning the allegations presented to it.

Even if the appellant and the Area Director provide their telephone numbers for use by the Board in connection with an appeal, it is not proper under 4 CFR 4.27 for the Board to become involved in oral (ex parte) communications with either party except in the presence of the other party. Decisions by the Board can be made only on the basis of the appeal record, which includes the parties' initial submissions plus subsequent letters, memoranda, or documents from either side that have been made available to the other side.

Where there is no requirement in the law or regulations, and no other reasonable explanation is offered, for using different bases in making the various adjustments needed to calculate the net monthly basic rental rate for Government-furnished quarters, a consistent basis must be used, even if the instructions for calculating such adjustments on the Department's rental computation worksheet appear to indicate otherwise.

Where date stamps on correspondence indicate that mailing time is only 3 to 5 days one way, a period of 2 months is a sufficient time for the Board to await a reply to its inquiry from an agency respondent. At the end of that time, in the absence of sufficient rebuttal, the allegations of an appellant who claims below-average electrical consumption may be taken as true, and an appellant's monthly electricity bill may be adjusted by the Board accordingly, provided that the claims are not unreasonable.

Walter W. Duncan, 5 OHA 256 (Feb. 8, 1984)

Where a counsel moves to reopen a Board decision and the motion is granted, and the parties are given a period substantially in excess of the time requested in which to submit additional evidence but both fail to do so, the Board is entitled to dispose of the case by a summary affirmation of the original decision.

Jean Rodgers et al. (On Reconsideration), 5 OHA 266 (Feb. 24, 1984)

A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)
91 I.D. 165

FEDERAL EMPLOYEES AND OFFICERS--Continued

GENERALLY--Continued

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive in relation to rates prevailing in the local community, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Jack T. Matuska, 5 OHA 346 (Aug. 24, 1984)

AUTHORITY TO BIND GOVERNMENT

The erroneous opinion or information of a Federal officer, agent or employee cannot operate to vest any right not authorized by law.

Lamar S Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

Neither the doctrine of equitable estoppel nor substantial fairness is available to offer appellant relief where reliance upon those doctrines is predicated upon circumstances which indicate appellant merely failed to make timely payment through its own neglect. The existence of a cover letter indicating a payment was sent where it subsequently appears there was no payment attached to the letter as shown, is insufficient alone to place the burden upon the Government to either establish it did not receive payment, or alternatively, to explain why it did not notify appellant of the apparent omission of payment from its letter.

Davis Oil Co., 79 IBLA 218 (Feb. 29, 1984)

Reliance on erroneous or incomplete information provided by Federal employees cannot create any rights not authorized by law.

Harriet C. Shaftel, 79 IBLA 228 (Feb. 29, 1984)

A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)
91 I.D. 165

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

GENERALLY

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(f) (1982), was intended by Congress to have application to patents issued to mining claims perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

California Portland Cement Corp., 83 IBLA 11 (Sept. 18, 1984)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CALIFORNIA DESERT CONSERVATION AREA

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Effect must be given, if possible, to every word, clause, and sentence in a statute. Therefore, the application of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), to mineral patent must be made in a manner which recognizes valid existing rights of a mineral claimant at the time of passage of the Act.

California Portland Cement Corp., 83 IBLA 11 (Sept. 18, 1984)

CORRECTION OF CONVEYANCE DOCUMENTS

Under sec. 316 of the Federal Land Policy and Management Act of 1976, the Secretary of the Interior has discretionary authority to correct an error in a conveyance document when the error is clearly established and equitable considerations dictate that relief be granted. BLM's rejection of an application to amend a homestead patent to include additional acreage will be affirmed where the record does not support a finding that the original patentees had entered those lands, nor was there ever any intent to enter such lands as part of the original homestead entry.

Elmer L. Love, 80 IBLA 101 (Apr. 3, 1984)

EXCHANGES

A protest against approval of a proposed land exchange, pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1976), is properly dismissed where the protestant has not established that BLM did not adequately consider the public interest or that the lands exchanged are not of equal value.

Seven Star Ranch, Inc., 78 IBLA 366 (Jan. 30, 1984)

While there is no Departmental policy absolutely forbidding multiparty exchanges under sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1976), no such exchange can be approved unless the land ultimately acquired by the United States benefits a Federal natural resource management program.

The fact that land sought in a private exchange is within a known geothermal resource area and is actually under lease is normally sufficient to support a finding that the land sought by the private party is more valuable for public purposes than the land which is being exchanged.

Harry M. Bailey, 79 IBLA 362 (Mar. 23, 1984)

Where a national conservation organization challenges a Bureau of Land Management determination to proceed with a private exchange, that organization satisfies the requirements of 43 CFR 4.410 by establishing that it is a "party to a case" and that it is adversely affected because its membership uses the public land in question.

Denial of a protest of a determination to proceed with a private exchange will be vacated and the case

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

remanded where the record fails to reflect an evaluation of the environmental impacts sufficient to support an informed judgment.

Where the record shows that missing information is material to an agency decision on a private land exchange, it must be gathered and included in an environmental assessment. Only where the costs of obtaining the information are exorbitant or the means of obtaining it are beyond the state of the art must the agency weigh the need for the action against the risk and severity of possible adverse impacts of proceeding in the face of uncertainty. And only in the case of a determination to proceed in the face of uncertainty must a worst case analysis be conducted in accordance with 40 CFR 1502.22.

National Wildlife Federation, 82 IBLA 303 (Sept. 5, 1984)

GRAZING LEASES AND PERMITS

A decision by BLM reducing authorized livestock grazing use pursuant to 43 CFR 4110.3-2(b) in order to facilitate achieving multiple-use management objectives, viz., allocating available forage to a competing antelope herd in the interest of promoting hunting and future transplanting, will not be disturbed absent substantial evidence showing that the decision is improper.

Charles Blackhead et als., 80 IBLA 42 (Mar. 28, 1984)

OMITTED LANDS

Pursuant to the provisions of sec. 211 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1721 (1976), a sale of omitted lands to an individual is only authorized where the lands have been occupied and developed for a 5-year period prior to Jan. 1, 1975, and where the objectives served by conveyance outweigh all public objectives which would be served by retention of the land in Federal ownership.

August & Mary Sobotka, 79 IBLA 340 (Mar. 22, 1984)

PERMITS

Where sufficient doubt is raised about the method of an appraisal of fair market rental value for a residential occupancy permit, the case may be remanded for the Bureau of Land Management to conduct a further appraisal or adjust the appraised value.

Clinton Iversen, 83 IBLA 72 (Sept. 28, 1984)

PLAN OF OPERATIONS

Significant alteration and enlargement of an existing access road constructed within a wilderness study area requires approval of a plan of operations.

William E. Godwin, 82 IBLA 105 (July 24, 1984)

RECORDATION OF MINING CLAIMS AND ABANDONMENT

For purposes of recordation under sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), the filing of notices of location, evidencing a date of location subsequent to the time at which mining claim location notices for the same land were declared null

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

and void ab initio, together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of the Act.

George Schultz et al., 81 IBLA 29 (May 17, 1984)

REPEALERS

The Small Tract Act, 43 U.S.C. § 682a (1970), was repealed by sec. 702 of the Federal Land Policy and Management Act of 1976, Oct. 21, 1976.

M. Lawrence Gock, 81 IBLA 366 (June 27, 1984)

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS

An application for conveyance of mineral interest to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1976), may be approved where BLM determines (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate non-mineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding of the existence of one of these conditions, an application is properly rejected.

An applicant for conveyance of a mineral interest may not be entitled to such a conveyance even when either or both of the conditions in sec. 209(b)(1) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1976), are satisfied. The language of that subsection is discretionary and entitles the Secretary or his designated representative to reject an application upon a determination supported by facts of record that conveyance of the mineral interest would not be in the public interest.

Deenan Investment Corp., 78 IBLA 311 (Jan. 12, 1984)

RIGHTS-OF-WAY

The holder of a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976), is required to pay annually, in advance, the fair market value of the grant. Appellant's contention that it should not pay annual rental is properly rejected where appellant's flood control project is completed but the right-of-way grant remains in effect and the land is being used for a dam, spillway, and reservoir.

Enoch Lake Irrigation Co., 78 IBLA 305 (Jan. 12, 1984)

Where BLM granted appellant's rights-of-way for communication sites under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), subject to a future appraisal, application of 43 CFR 2803.1-2(b) providing that BLM establish an estimated rental fee, collect the fee in advance, and adjust the advance rental fee upon receipt of an approved fair market appraisal, is not a prohibited imposition of a retroactive rental.

The preferred method for appraising the fair market value of nonlinear rights-of-way, including microwave transmission sites, is the comparable lease method of appraisal where there is sufficient comparable rental data and appropriate adjustments are made for

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

differences between the subject sites and other leased sites.

Mountain States Telephone & Telegraph Co., 79 IBLA 5 (Feb. 2, 1984)

Under Departmental regulation 43 CFR 2803.1-2(c), a nonprofit electric distribution cooperative whose principal source of revenue is customer charges is not eligible for an exemption or reduction of fair market rental imposed for a right-of-way under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976).

Colorado-Ute Electric Ass'n, Inc., 79 IBLA 53 (Feb. 9, 1984)

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g), indicates that under certain circumstances the Secretary of the Interior may charge less than fair market value for annual right-of-way rental, including no charge. However, no reduction or waiver of the fee based on fair market rental will be made if the right-of-way user is a cooperative or similar organization whose principal source of revenue is customer charges.

Wellton-Mohawk Irrigation & Drainage District, 79 IBLA 308 (Mar. 20, 1984)

Where BLM grants a right-of-way for a haul road under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), subject to a future appraisal, BLM may subsequently appraise the land included in the right-of-way, and the rental charges imposed from the date of the right-of-way grant will not be considered retroactive.

Lone Star Steel Co., 79 IBLA 345 (Mar. 22, 1984)

An appellant seeking reversal of a decision denying a protest against issuance of a right-of-way across land in a wilderness study area to state-owned land must show that the decision was premised either on a clear error of law or a demonstrable error of fact. Where state land is encircled by Federal land within a wilderness study area, the state's lessee has a right of access across Federal land pursuant to 16 U.S.C. § 3210(b) (Supp. V 1981) adequate to secure the reasonable use and enjoyment of the leasehold. Because the BLM may not deny such access by requiring the lessee to use helicopters, BLM need not examine the feasibility of helicopter access in its consideration of a right-of-way application.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)
91 I.D. 165

Where there is no appraisal to support a readjusted rental rate for a water pipeline right-of-way, a decision imposing the readjusted rate must be reversed.

A. Keith Barber, 81 IBLA 332 (June 19, 1984)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

BLM properly requires the holder of a right-of-way for an access road to pay its fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), but where there is no evidence that BLM considered the question of whether the holder is entitled to a reduced fee because a valuable benefit is provided to the public by maintenance and improvement of the road, the case will be remanded to BLM to consider that question.

William K. Bigbor, 82 IBLA 6 (July 2, 1984)

A decision imposing rental charges on a Rural Electrification Act cooperative for a powerline right-of-way grant, pursuant to sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), will be set aside where subsequent to the decision that section is amended, P.L. 98-300, 98 Stat. 215 (1984), to provide that rights-of-way shall be granted, without rental fees, for electric facilities financed pursuant to the Rural Electrification Act of 1936.

La Plata Electric Ass'n, Inc., 82 IBLA 159 (Aug. 2, 1984)

BLM may properly reject an application for a powerline right-of-way crossing the Snake River pursuant to its discretion under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), in the interest of preserving the scenic quality of the area and protecting raptors listed as endangered and threatened where the record shows the decision to be a reasoned analysis of the factors involved, including the availability of feasible alternatives, made with due regard for the public interest.

Lower Valley Power & Light, Inc., 82 IBLA 216 (Aug. 22, 1984)

In granting a right-of-way for access over an existing road pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), BLM may not unreasonably burden the right-of-way by requiring upgrading of the road where upgrading is neither commensurate with the holder's intended use of the road nor designed to protect any other resource value which might be adversely affected by such use.

James E. Loopan, Elizabeth K. Loopan, 82 IBLA 345 (Sept. 17, 1984)

Where the State of Idaho accepted a grant pursuant to sec. 8 of the Act of July 26, 1866, 43 U.S.C. § 932, otherwise known as R.S. 2477 (repealed, sec. 706(a) of FLPMA, 90 Stat. 2793), for a highway right-of-way over public lands, the State's right-of-way remains in effect pursuant to sec. 701(a) of FLPMA, 90 Stat. 2786.

R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal law. By the time of the R.S. 2477 Idaho grant, Congress had already determined that telephone cables were not within the scope of an R.S. 2477 highway right-of-way. Thus, a telephone cable buried along an R.S. 2477 highway with a right-of-way from the State of Idaho but without the requisite BLM right-of-way is in trespass.

Mountain Bell, 83 IBLA 67 (Sept. 26, 1984)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

A decision imposing rental charges under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), for a right-of-way for a telephone line financed pursuant to the Rural Electrification Act of 1936 will be reversed on appeal to conform to the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, providing that rights-of-way shall be granted without rental fees for such facilities.

Pursuant to sec. 504(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(a) (1982), the Secretary of the Interior has discretion to set the limits of a right-of-way in the area to be occupied by the facilities authorized thereunder, the area required for operation and maintenance of the facilities, the area required for protection of public safety, and the area required for protection of the environment against unnecessary damage. An appellant challenging the determination of boundaries for a right-of-way has the burden of showing error.

Beehive Telephone Co., Inc., 83 IBLA 86 (Sept. 28, 1984)

SALES

Pursuant to the provision of sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1976), the Secretary is directed to condition any patent issued thereunder with such terms or reservations as are necessary to ensure proper land use and protect the public interest. A party challenging any such condition must show that it does not reasonably ensure proper land use or protect the public interest.

August & Mary Sobotka, 79 IBLA 340 (Mar. 22, 1984)

The existence of a mining claim precludes the sale of the land under sec. 203 of the Federal Land Policy and Management Act of 1976 until the claim is found to be invalid or otherwise extinguished.

Historic but unauthorized use of the land can be considered when determining whether public lands can be offered for sale utilizing the modified competitive bidding procedures outlined in 43 CFR 2711.3-2(a).

In a noncompetitive sale of land under the provisions of sec. 203(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(a) (1982), to other than a governmental entity, it must be demonstrated that the tract identified for sale is an integral part of a project of public importance or that there is a need to recognize a previous authorized use.

Hazel Anne Smith et al., 82 IBLA 230 (Aug. 23, 1984)

Where BLM appraises a parcel of land subject to a communication site right-of-way for direct sale to the holder of the grant pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), it is proper for BLM to appraise the parcel as if unencumbered, since the right-of-way is extinguished upon the right-of-way holder's acquisition of the fee title.

Colo Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS

The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1782(c) (1976) requires the Secretary to regulate mining operations in lands under wilderness review to prevent impairment of the suitability of these areas for prospective or potential inclusion in the wilderness system. Where a proposed mining plan of operation on such land calls for the use of mechanized earthmoving equipment to clear a new area and the creation of new roads in new areas, BLM properly rejected the plan.

Mining operations in lands under wilderness review may continue even if they are determined to be impairing wilderness values if the operations are occurring in the same manner and degree that they were being conducted on Oct. 21, 1976. Mining activities not exceeding that manner and degree shall be regulated only to prevent undue and unnecessary degradation of public lands. However, the existence of mining operations actually being conducted on the land on Oct. 21, 1976, and not mere statutory right to use, is required to authorize subsequent mining activities in the same manner and degree.

Doris Cape, 79 IBLA 204 (Feb. 28, 1984)

Organic Act Directive 78-61, Change 3, at page 3, provides that BLM may in certain instances properly adjust the boundary of an inventory unit based on the outstanding opportunity criterion.

In evaluating a unit's opportunity for solitude, BLM is directed by the Wilderness Inventory Handbook to consider factors which influence solitude only as they affect a person's opportunity to avoid the sights, sounds, and evidence of other people in the inventory unit. Factors or elements influencing solitude may include size, natural screening, and the ability of the user to find a secluded spot.

In assessing the presence or absence of wilderness characteristics in an inventory unit, the Bureau of Land Management necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal, and such judgments may not be overcome by expressions of simple disagreement.

The Wilderness Society et al., 81 IBLA 181 (June 1, 1984)

Significant alteration and enlargement of an existing access road constructed within a wilderness study area requires approval of a plan of operations.

William E. Godwin, 82 IBLA 105 (July 24, 1984)

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

Where oil and gas deposits in lands acquired by the United States and devoted to use for military purposes become "surplus property" under the Federal Property and Administrative Services Act, such deposits may be leased only under the provisions of that Act, and are not subject to leasing under the Mineral Leasing Act for Acquired Lands.

Gerald A. Waters, 78 IBLA 387 (Jan. 31, 1984)

FEES

Under Departmental regulation 43 CFR 2803.1-2(C), a nonprofit electric distribution cooperative whose principal source of revenue is customer charges is not eligible for an exemption or reduction of fair market rental imposed for a right-of-way under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976).

Colorado-Ute Electric Ass'n, Inc., 79 IBLA 53 (Feb. 9, 1984)

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g), indicates that under certain circumstances the Secretary of the Interior may charge less than fair market value for annual right-of-way rental, including no charge. However, no reduction or waiver of the fee based on fair market rental will be made if the right-of-way user is a cooperative or similar organization whose principal source of revenue is customer charges.

Wellton-Mohawk Irrigation & Drainage District, 79 IBLA 308 (Mar. 20, 1984)

Where there is no appraisal to support a readjusted rental rate for a water pipeline right-of-way, a decision imposing the readjusted rate must be reversed.

A. Keith Barben, 81 IBLA 332 (June 19, 1984)

A decision imposing rental charges on a Rural Electrification Act cooperative for a powerline right-of-way grant, pursuant to sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), will be set aside where subsequent to the decision that section is amended, P.L. 98-300, 98 Stat. 215 (1984), to provide that rights-of-way shall be granted, without rental fees, for electric facilities financed pursuant to the Rural Electrification Act of 1936.

La Plata Electric Ass'n, Inc., 82 IBLA 159 (Aug. 2, 1984)

FISH AND WILDLIFE COORDINATION ACT

Inasmuch as coordination lands are properly deemed to be units of the National Wildlife Refuge System, oil and gas lease offers for such lands may not be granted, unless drainage is occurring, until such time as the Secretary of the Interior promulgates new regulations in conformity with sec. 137 of the 1984 Continuing Resolution, 97 Stat. 981.

D. M. Yates, 82 IBLA 389 (Sept. 13, 1984)

FISH AND WILDLIFE SERVICE

The Act of May 23, 1908, 35 Stat. 267, as amended, 16 U.S.C. § 671 (1976), providing for the establishment of the National Bison Range, terminated the status of the land included therein as land reserved for Indian use.

Hingeline Overthrust Oil & Gas, Inc., 80 IBLA 4 (Mar. 27, 1984)

GEOTHERMAL LEASES

CANCELLATION

BLM may properly hold for cancellation a competitive geothermal resources lease, issued pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for failure to engage in exploration operations meeting minimum per acre expenditure requirements or to pay an additional rental after the fifth year of the primary lease term, in accordance with 43 CFR 3203.5. The lessee must pay the increased rental in arrears and will have 30 days following receipt of notice of cancellation either to correct the violation or, if the lessee elects to engage in exploration operations and is unable to meet the expenditure requirements within 30 days, to commence such operations in good faith within that time period and thereafter to proceed diligently to meet such requirements, or may elect to continue payment of the rental at the increased rate.

Union Texas Exploration Co., 81 IBLA 153 (May 31, 1984)
91 I.D. 238

Where BLM has denied a protest of the proposed issuance of competitive geothermal resources leases pursuant to sec. 4 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1003 (1982), the effect of the decision is stayed during the time the protestant may file an appeal and while the appeal is pending, and issuance of the leases during that time will be considered subject to cancellation by the Board.

Where BLM has issued competitive geothermal resources leases to a corporation pursuant to sec. 4 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1003 (1982), with notice of a private dispute regarding the authority of an officer of the corporation to act on behalf of the corporation in submitting the lease bids, the Board will not direct cancellation of the leases, but BLM may not approve any assignments of the leases, or drilling permits on the leases until the dispute between the parties is resolved through agreement or litigation.

Lawrence H. Merchant, 81 IBLA 360 (June 27, 1984)

COMPETITIVE LEASES

BLM may properly hold for cancellation a competitive geothermal resources lease, issued pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for failure to engage in exploration operations meeting minimum per acre expenditure requirements or to pay an additional rental after the fifth year of the primary lease term, in accordance with 43 CFR 3203.5. The lessee must pay the increased rental in arrears and will have 30 days following receipt of notice of cancellation either to correct the violation or, if the lessee elects to engage in exploration operations and is unable to meet the expenditure requirements within 30 days, to commence such operations in good faith within that time period and thereafter to proceed diligently to meet such requirements, or may elect to continue payment of the rental at the increased rate.

Union Texas Exploration Co., 81 IBLA 153 (May 31, 1984)
91 I.D. 238

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive geothermal leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of

opinion, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Aminoil USA, Inc., 81 IBLA 231 (June 6, 1984)

Where BLM has denied a protest of the proposed issuance of competitive geothermal resources leases pursuant to sec. 4 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1003 (1982), the effect of the decision is stayed during the time the protestant may file an appeal and while the appeal is pending, and issuance of the leases during that time will be considered subject to cancellation by the Board.

Where BLM has issued competitive geothermal resources leases to a corporation pursuant to sec. 4 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1003 (1982), with notice of a private dispute regarding the authority of an officer of the corporation to act on behalf of the corporation in submitting the lease bids, the Board will not direct cancellation of the leases, but BLM may not approve any assignments of the leases, or drilling permits on the leases until the dispute between the parties is resolved through agreement or litigation.

Lawrence H. Merchant, 81 IBLA 360 (June 27, 1984)

ENVIRONMENTAL PROTECTION

Generally

Where BLM adopted a staged leasing approach to environmental review for a geothermal lease sale in the Mono-Long Valley Known Geothermal Resources Area, but the record contains ambiguities and inconsistencies concerning the exploration and development rights to be granted and the limitations to be placed on leases to be issued in that area and the notice of lease sale did not contain a "conditional stipulation," the decision dismissing a protest to the sale will be set aside and the case remanded to allow BLM to clarify its intent concerning the proposed leasing.

Sierra Club, The Mono Lake Committee, 79 IBLA 240 (Mar. 1, 1984)

KNOWN GEOTHERMAL RESOURCES AREA

BLM must reject noncompetitive geothermal resources lease applications where the land sought is determined to be within a known geothermal resources area at any time prior to the issuance of a lease. Applicants have presented unsubstantiated allegations that BLM discriminated against the applicants by improperly delaying the processing of their applications until the determination was made but have not rebutted the determination, which was based on the convergence of geologic, geophysical, and exploration well data, by a preponderance of the evidence.

Cuadra Geothermal, Inc., et al., 82 IBLA 188 (Aug. 16, 1984)

NONCOMPETITIVE LEASES

BLM must reject noncompetitive geothermal resources lease applications where the land sought is determined to be within a known geothermal resources area at any time prior to the issuance of a lease. Applicants have presented unsubstantiated allegations that BLM discriminated against the applicants by improperly delaying the processing of their applications until the determination was made but have not

GEOTHERMAL LEASES--Continued

NONCOMPETITIVE LEASES--Continued

rebutted the determination, which was based on the convergence of geologic, geophysical, and exploration well data, by a preponderance of the evidence.

Quadra Geothermal, Inc., et al., 82 IBLA 188 (Aug. 16, 1984)

TERMINATION

BLM may properly hold for cancellation a competitive geothermal resources lease, issued pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for failure to engage in exploration operations meeting minimum per acre expenditure requirements or to pay an additional rental after the fifth year of the primary lease term, in accordance with 43 CFR 3203.5. The lessee must pay the increased rental in arrears and will have 30 days following receipt of notice of cancellation either to correct the violation or, if the lessee elects to engage in exploration operations and is unable to meet the expenditure requirements within 30 days, to commence such operations in good faith within that time period and thereafter to proceed diligently to meet such requirements, or may elect to continue payment of the rental at the increased rate.

Union Texas Exploration Co., 81 IBLA 153 (May 31, 1984) 91 I.D. 238

GRAZING AND GRAZING LANDS

Implementation of the Taylor Grazing Act of 1934, as amended, is committed to the discretion of the Secretary of the Interior. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100.

Clyde L. Dorius, Douglas L. Bown v. Bureau of Land Management, 83 IBLA 29 (Sept. 24, 1984)

GRAZING LEASES

APPLICATIONS

A decision by an Administrative Law Judge setting aside a BLM decision rejecting the grazing preference application of the longstanding holder of a temporary nonrenewable license because of the equities in favor of the applicant will be set aside on appeal and remanded so that BLM may consider whether the applicant is entitled to a grazing permit for the additional forage within a particular allotment in accordance with 43 CFR 4110.3-1 and 4110.5.

Ray Pershall v. Bureau of Land Management, 80 IBLA 168 (Apr. 13, 1984)

ASSIGNMENT

Where there is a private dispute involving the validity or effect of a grazing lease assignment, it is improper for the Bureau of Land Management to take action on a request for assignment approval until final resolution of the private dispute and receipt of notice of the result of the final determination.

Charles H. Dorman et al. (Appellants) v. Robert L. Meyer, Roger W. Ranger (Appellees), 79 IBLA 209 (Feb. 28, 1984)

GRAZING LEASES--Continued

PREFERENCE RIGHT APPLICANTS

A decision by an Administrative Law Judge setting aside a BLM decision rejecting the grazing preference application of the longstanding holder of a temporary nonrenewable license because of the equities in favor of the applicant will be set aside on appeal and remanded so that BLM may consider whether the applicant is entitled to a grazing permit for the additional forage within a particular allotment in accordance with 43 CFR 4110.3-1 and 4110.5.

Ray Pershall v. Bureau of Land Management, 80 IBLA 168 (Apr. 13, 1984)

GRAZING PERMITS AND LICENSES

GENERALLY

BLM has discretionary authority to require eartagging to promote the orderly administration of public lands, and a decision requiring that livestock be eartagged will be sustained where the record establishes a rational basis therefor.

Bess Land & Livestock Co., et al. v. Bureau of Land Management, 82 IBLA 265 (Aug. 29, 1984)

Implementation of the Taylor Grazing Act of 1934, as amended, is committed to the discretion of the Secretary of the Interior. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100.

Clyde L. Dorius, Douglas L. Bown v. Bureau of Land Management, 83 IBLA 29 (Sept. 24, 1984)

ADJUDICATION

A decision by an Administrative Law Judge setting aside a BLM decision rejecting the grazing preference application of the longstanding holder of a temporary nonrenewable license because of the equities in favor of the applicant will be set aside on appeal and remanded so that BLM may consider whether the applicant is entitled to a grazing permit for the additional forage within a particular allotment in accordance with 43 CFR 4110.3-1 and 4110.5.

Ray Pershall v. Bureau of Land Management, 80 IBLA 168 (Apr. 13, 1984)

APPEALS

A decision by an Administrative Law Judge setting aside a BLM decision rejecting the grazing preference application of the longstanding holder of a temporary nonrenewable license because of the equities in favor of the applicant will be set aside on appeal and remanded so that BLM may consider whether the applicant is entitled to a grazing permit for the additional forage within a particular allotment in accordance with 43 CFR 4110.3-1 and 4110.5.

Ray Pershall v. Bureau of Land Management, 80 IBLA 168 (Apr. 13, 1984)

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

Implementation of the Taylor Grazing Act of 1934, as amended, is committed to the discretion of the Secretary of the Interior. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100.

Clyde L. Dorius, Douglas L. Bown v. Bureau of Land Management, 83 IBLA 29 (Sept. 24, 1984)

CANCELLATION OR REDUCTION

A decision by BLM reducing authorized livestock grazing use pursuant to 43 CFR 4110.3-2(b) in order to facilitate achieving multiple-use management objectives, viz., allocating available forage to a competing antelope herd in the interest of promoting hunting and future transplanting, will not be disturbed absent substantial evidence showing that the decision is improper.

Charles Blackburn et al., 80 IBLA 42 (Mar. 28, 1984)

RANGE SURVEYS

Where 43 CFR 4110.3-2 was amended to require supporting data prior to decision in certain cases involving changes in grazing use of the public lands, and the amended regulation became effective prior to decision by the Administrative Law Judge assigned to consider the decision on appeal, the amended rule was properly applied where the basis for the declared policy of the Department respecting grazing decisions rests upon a determination that the amended rule is required by known facts.

A regulation promulgated following decision by the Bureau of Land Management in 1982 is applicable to require use of trend studies to supplement a 1978 range survey where the 1978 survey alone, without trend studies made in intervening years, is an inadequate basis for decision pursuant to 43 CFR 4110.3-2(c) (1983).

Where the Bureau of Land Management uses a 1978 range survey as the sole basis for a 1982 decision limiting range cattle carrying capacity, the decision is not adequately supported where circumstances indicate the single survey may be inconclusive as to the true condition of the range under 42 CFR 4110.3-2(c) (1983).

Clyde L. Dorius, Douglas L. Bown v. Bureau of Land Management, 83 IBLA 29 (Sept. 24, 1984)

HEARINGS

The holder of a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976), is required to pay annually, in advance, the fair market value of the grant. Appellant's contention that it should not pay annual rental is properly rejected where appellant's flood control project is completed but the right-of-way grant remains in effect and the land is being used for a dam, spillway, and reservoir.

Ranch Lake Irrigation Co., 78 IBLA 305 (Jan. 12, 1984)

HEARINGS--Continued

A prima facie case is made where sufficient evidence is presented to establish the essential facts. Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. It is not necessary to present evidence that is compelling, and the determination must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence and the difficulty which may reasonably be encountered in obtaining the evidence.

S & M Coal Co. & Jewell Smokeless Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 350 (Mar. 22, 1984) 91 I.D. 159

Where a simultaneous oil and gas lease applicant, whose application has been rejected because it covers land within a known geologic structure, submits probative evidence contravening the determination that the land is presumptively productive of oil and gas, which is not fully rebutted, but where, nonetheless, questions of fact remain unresolved by the record, a hearing is appropriate to establish a sufficient record to permit decision.

Lloyd Chemical Sales, Inc., 82 IBLA 182 (Aug. 13, 1984)

Under 43 CFR 2802.1-7(e) (1974), which provided that charges for use and occupancy of a right-of-way may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure where the right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and has not been conformed to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982).

Cole Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. An oral hearing on a color-of-title application will be denied where there are no allegations of fact which would establish the color-of-title claim.

Kim C. Evans, 82 IBLA 319 (Sept. 6, 1984)

INDIAN ALLOTMENTS ON PUBLIC DOMAIN

GENERALLY

Where the Secretary of Agriculture has made a determination pursuant to sec. 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1976), that lands within a national forest are of no value for the timber found thereon and are of negligible value for agricultural or grazing purposes, the Secretary of the Interior may properly reject the allotment where the record shows that the land in question is not a viable economic agricultural unit.

Warren J. Conrad, 79 IBLA 394 (Mar. 27, 1984)

CLASSIFICATION

When an application is made for an allotment under the provisions of 25 U.S.C. § 337 (1976), governing allotments to Indians within national forests, the application is referred to the Secretary of Agriculture for a determination whether the lands are more valuable for agricultural or grazing purposes than for the

INDIAN ALLOTMENTS ON PUBLIC DOMAIN--Continued

CLASSIFICATION--Continued

timber found thereon. The Department of the Interior is bound by the determination of the Secretary of Agriculture and is constrained to follow that decision.

Warren J. Conrad, 79 IBLA 394 (Mar. 27, 1984)

LANDS SUBJECT TO

When an application is made for an allotment under the provisions of 25 U.S.C. § 337 (1976), governing allotments to Indians within national forests, the application is referred to the Secretary of Agriculture for a determination whether the lands are more valuable for agricultural or grazing purposes than for the timber found thereon. The Department of the Interior is bound by the determination of the Secretary of Agriculture and is constrained to follow that decision.

Where the Secretary of Agriculture has made a determination pursuant to sec. 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1976), that lands within a national forest are of no value for the timber found thereon and are of negligible value for agricultural or grazing purposes, the Secretary of the Interior may properly reject the allotment where the record shows that the land in question is not a viable economic agricultural unit.

Warren J. Conrad, 79 IBLA 394 (Mar. 27, 1984)

INDIAN LANDS

GENERALLY

The Act of May 23, 1908, 35 Stat. 267, as amended, 16 U.S.C. § 671 (1976), providing for the establishment of the National Bison Range, terminated the status of the land included therein as land reserved for Indian use.

Wingeling Overthrust Oil & Gas, Inc., 80 IBLA 4 (Mar. 27, 1984)

ALLOTMENTS

Generally

A "trust patent" cannot be canceled administratively without providing notice and opportunity for a hearing, and any purported cancellation which is not premised on due process is without effect and void.

Irene Mitchell Pallin, Edward E. Mitchell, Jr., 80 IBLA 383 (May 14, 1984)

Alienation

The Secretary or his delegate has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

Terese L. Garrett v. Ass't Secretary for Indian Affairs, 13 IBIA 8 (Aug. 21, 1984) 91 I.D. 262

INDIAN LANDS--Continued

LEASES AND PERMITS

Generally

The Board of Indian Appeals will apply the law of the state in which real property held in trust for an Indian lessor is located in determining whether prepaid rent may be retained by the lessor when a lease was canceled because of the lessee's violations.

Clayton J. Gray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984) 91 I.D. 43

Minerals

Where the Office of Surface Mining Reclamation and Enforcement issued a notice of violation charging a violation of regulations in 30 CFR Part 211 (1980) at a surface coal mining operation on Indian land, the notice was properly vacated since the scope provision of those regulations, 30 CFR 211.1(a), specifically excluded from the coverage of 30 CFR Part 211 operations on Indian land.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 14 (Feb. 3, 1984)

Revocation or Cancellation

A decision of the Bureau of Indian Affairs that cancels a lease of Indian trust lands generally involves an interpretation of the lease provisions, relevant Federal regulations governing cancellation procedures, and applicable Federal, state, and tribal case and statutory law. Such a decision cannot properly be characterized under 25 CFR 2.19 as solely discretionary.

Clayton J. Gray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984) 91 I.D. 43

RESTRICTED ALLOTMENT

Land interests held in Indian trust status by the Department of the Interior are not subject to setoff, levy, and/or execution on the basis of a state court decision.

Estate of Alice Mae Sasse, 12 IBIA 281 (June 25, 1984)

The Secretary or his delegate has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

Terese L. Garrett v. Ass't Secretary for Indian Affairs, 13 IBIA 8 (Aug. 21, 1984) 91 I.D. 262

TRUST PATENT

A "trust patent" cannot be canceled administratively without providing notice and opportunity for a hearing, and any purported cancellation which is not premised on due process is without effect and void.

Irene Mitchell Pallin, Edward E. Mitchell, Jr., 80 IBLA 383 (May 14, 1984)

INDIAN PROBATE

ADMINISTRATIVE LAW JUDGE

An Administrative Law Judge in an Indian probate proceeding is generally not required to anticipate or discover additional legal arguments or evidence that might be beneficial to an individual's case.

When an individual participating in a Departmental Indian probate proceeding is not represented by counsel, the Federal trust responsibility, which is shared by the Administrative Law Judge conducting the proceeding, requires that the Administrative Law Judge ensure that manifest injustice is not committed, or if committed, is corrected.

The Administrative Law Judge conducting an Indian probate proceeding is required to ensure that all claims against the decedent's trust estate are legally allowable before approving them for payment.

Estate of Wesley Emmett Anton, 12 IBIA 139 (Jan. 23, 1984)

ADOPTION (See also CHILDREN, ADOPTED--if included in this Index.)

Crow Tribe

Unless an estate was being probated when the Act was passed, under the Crow Adoption Act of Mar. 3, 1931, 46 Stat. 1494, an individual may not be recognized as an adopted child of a deceased member of the Crow Tribe of Montana unless the adoption was by a judgment or decree of a state court, or was a written adoption approved by the Superintendent of the Crow Agency and recorded in a book kept by him for that purpose.

Estate of Alice N. Whiteman Bides Pretty Hayden, 12 IBIA 203 (Mar. 21, 1984)

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)

Generally

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was erroneous is on the person challenging the decision.

Estate of Verona Sean Kitchell, 12 IBIA 258 (May 31, 1984)

ATTORNEYS AT LAW

Fees

Under 43 CFR 4.281, an Administrative Law Judge or the Board of Indian Appeals is an authorized representative of the Secretary within the meaning of 25 CFR 115.9 to approve the disbursement of trust funds from an Individual Indian Money account for the payment of attorney fees arising from representation of an Indian client in a Departmental probate proceeding.

In re Attorney Fees Request of Gosta E. Day, 12 IBIA 132 (Jan. 23, 1984) 91 I.D. 39

In considering a petition for the award of attorney fees in an Indian probate proceeding, the

INDIAN PROBATE--Continued

ATTORNEYS AT LAW--Continued

Fees--Continued

Board will examine the itemized list of services provided to the client to determine whether each item is allowable.

In re Attorney Fees Request of Joanne Foster & In re Attorney Fees Request of Fr. J. Stefka, 12 IBIA 172 (Feb. 10, 1984)

CHILDREN, ILLEGITIMATE (See also INHERITING--if included in this Index.)

Generally

The status of an Indian child as illegitimate and the required proof of paternity are questions of Federal law.

Estate of James Howling Crane, Sr., 12 IBIA 209 (Mar. 22, 1984)

Right to Inherit

Child from Father

Under 25 U.S.C. § 371 (1976), an illegitimate Indian child is entitled to inherit from the person shown to be his father.

Estate of James Howling Crane, Sr., 12 IBIA 209 (Mar. 22, 1984)

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, LIMITATION Index.)

Allowable Items

The Administrative Law Judge conducting an Indian probate proceeding is required to ensure that all claims against the decedent's trust estate are legally allowable before approving them for payment.

Estate of Wesley Emmett Anton, 12 IBIA 139 (Jan. 23, 1984)

Proof of Claim

The mere assertion by a Government agency that its records show that it has a claim against an Indian decedent's trust estate is insufficient to prove entitlement to the claimed amount.

Estate of Wesley Emmett Anton, 12 IBIA 139 (Jan. 23, 1984)

EVIDENCE

Generally

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person seeking reopening.

Estate of Jason Crane, 12 IBIA 165 (Feb. 3, 1984)

INDIAN PROBATE--Continued

EVIDENCE--Continued

Insufficiency of

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person seeking reopening.

Estate of Wilma Florence First Youngman, 12 IBIA 219 (Apr. 4, 1984)

GUARDIAN AD LITEM

Generally

Departmental regulations requiring that a guardian ad litem be appointed for a minor or for an incompetent person in an Indian probate proceeding are intended to ensure that the interests of such a party are fully represented at the hearing.

Estate of Jason Crane, 12 IBIA 165 (Feb. 3, 1984)

HEARING (See also ADMINISTRATIVE PROCEDURE, REHEARING--if included in this Index.)

Full and Complete

Although unorthodox methods of conducting hearings in Indian probate proceedings are not encouraged, when circumstances beyond the control of the parties or Judge necessitate unusual procedures, the Administrative Law Judge bears an additional responsibility to ensure that all parties are fully heard and that the Department's trust responsibility is properly discharged.

Estate of Jesse Pawnee, 12 IBIA 277 (June 11, 1984)

INHERITING (See also CHILDREN, ADOPTED; CHILDREN, ILLEGITIMATE; WILLS--if included in this Index.)

Generally

It is manifest error to include in the chain of title to Indian trust land the name of an individual who was not alive to inherit.

Estate of James Largo, 12 IBIA 224 (Apr. 12, 1984) 91 I.D. 185

INTERLOCUTORY APPEALS

Administrative Law Judges (Indian Probate) have authority under 43 CFR 4.28 to certify interlocutory questions to the Board of Indian Appeals.

Estate of James Largo, 12 IBIA 224 (Apr. 12, 1984) 91 I.D. 185

MARRIAGE

Generally

The status of an individual is determined by the law of the jurisdiction having the most significant contacts with the individual or in which the relationship at issue was created.

Estate of Wilma Florence First Youngman, 12 IBIA 219 (Apr. 4, 1984)

INDIAN PROBATE--Continued

MARRIAGE--Continued

Proof of Marriage

A common-law marriage must be established by the one alleging such a marriage.

Estate of Wilma Florence First Youngman, 12 IBIA 219 (Apr. 4, 1984)

REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING--if included in this Index.)

Generally

Rehearings in Indian probate proceedings are intended to allow consideration of alleged errors made by the Administrative Law Judge and to permit the introduction of evidence that could not, with diligent effort, have been discovered prior to the original hearing. They are not a means for presenting evidence and arguments that were known at the time of the original hearing but simply not introduced.

Estate of Alice Mae Sasse, 12 IBIA 281 (June 25, 1984)

Estate of Benjamin Kent, Sr. (Ben Wawanowayl), 13 IBIA 21 (Aug. 29, 1984)

REOPENING

Generally

An Administrative Law Judge has authority under 43 CFR 4.242(b) to reopen an Indian probate estate that has been closed for more than 3 years.

The Board of Indian Appeals has consistently held that petitions to reopen closed Indian trust estates require compelling proof that delay in requesting relief was not occasioned by lack of diligence on the part of the petitioning party.

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person seeking reopening.

Estate of Jason Crane, 12 IBIA 165 (Feb. 3, 1984)

The failure of the Bureau of Indian Affairs to seek reopening of a closed Indian probate estate when it has information indicating some likelihood that a probate decision is incorrect is manifest error.

Estate of John Yazza Antonio, 12 IBIA 177 (Feb. 29, 1984)

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person seeking reopening.

Estate of Wilma Florence First Youngman, 12 IBIA 219 (Apr. 4, 1984)

Under the provisions of 43 CFR 4.242(b), the burden of proving entitlement to reopening in Indian probate proceedings lies with the petitioner.

Estate of Louise Assiotte Lajtay, 12 IBIA 229 (Apr. 30, 1984)

INDIAN PROBATE--Continued

REOPENING--Continued

Generally--Continued

When reopening of a closed Indian estate is sought for the sole purpose of determining the appellant's nationality or Indian status, and no alteration in the distribution of the decedent's estate is sought, reopening will be allowed under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous decisions of the Board of Indian Appeals interpreting that regulation.

Estate of Edward (Agopetah) Bert, 12 IBIA 253 (May 22, 1984) 91 I.D. 235

REPRESENTATION

The fact that an individual participating in a Departmental Indian probate proceeding is not represented by counsel does not entitle him to special rights not enjoyed by individuals who are so represented.

When an individual participating in a Departmental Indian probate proceeding is not represented by counsel, the Federal trust responsibility, which is shared by the Administrative Law Judge conducting the proceeding, requires that the Administrative Law Judge ensure that manifest injustice is not committed, or if committed, is corrected.

Estate of Wesley Emmett Anton, 12 IBIA 139 (Jan. 23, 1984)

SECRETARY'S AUTHORITY

Generally

The Department of the Interior is not bound by state court decisions in determining the heirs of a deceased Indian, but rather has the authority and responsibility to make an independent determination of the decedent's heirs. A state court decision may present persuasive evidence of heirship.

Estate of James Howling Crane, Sr., 12 IBIA 209 (Mar. 22, 1984)

STATE LAW

Generally

The Department of the Interior is not bound by state court decisions in determining the heirs of a deceased Indian, but rather has the authority and responsibility to make an independent determination of the decedent's heirs. A state court decision may present persuasive evidence of heirship.

Estate of James Howling Crane, Sr., 12 IBIA 209 (Mar. 22, 1984)

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)

Alterations and Erasures

Alterations in an Indian will do not in and of themselves void the will when the meaning of the will is not changed. If a will contains unattested changes, the changes will be disregarded and the instrument

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)--Continued

Alterations and Erasures--Continued

admitted to probate when the original intention of the testator can be ascertained.

Estate of Grace Dion Antelope Horse Ring, 12 IBIA 232 (Apr. 30, 1984)

Disapproval of Will

In determining whether an Indian will presents a testamentary scheme that is so unnatural or so lacking in rationality that it must be disapproved, the Department is bound by the holding of the Supreme Court in Tooahnippah v. Hickel, 397 U.S. 598 (1970).

Estate of Verena Gean Kitchell, 12 IBIA 258 (May 31, 1984)

Revocation

Without some physical act by the testator expressly changing or revoking an Indian will, the Department is without authority to disapprove the will on the grounds that the testator intended to or did revoke the will.

Estate of Grace Dion Antelope Horse Ring, 12 IBIA 232 (Apr. 30, 1984)

Testamentary Capacity

Generally

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Furthermore, the evidence must show that this condition existed at the time of the execution of the will.

Estate of Evelyn Westwolf Mospey Bear Walker Rosero, 12 IBIA 215 (Mar. 27, 1984)

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will.

Estate of Grace Dion Antelope Horse Ring, 12 IBIA 232 (Apr. 30, 1984)

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will.

An allegation that an Indian decedent took medication for a mental condition is insufficient to support a finding of lack of testamentary capacity.

Estate of Ella Derand, 12 IBIA 238 (May 16, 1984)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)--Continued

Testamentary Capacity--Continued

Generally--Continued

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

Estate of Verena Gean Kitchell, 12 IBIA 258 (May 31, 1984)

Undue Influence

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) that he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Evelyn Westwolf Mooney Bear Walker Romero, 12 IBIA 215 (Mar. 27, 1984)

Estate of Verena Gean Kitchell, 12 IBIA 258 (May 31, 1984)

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) that he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Grace Dion Antelope Horse Ring, 12 IBIA 232 (Apr. 30, 1984)

Witnesses, Attesting

There is no requirement that the witness of an Indian will must be a longstanding and/or intimate acquaintance of the decedent.

Estate of Ella Berard, 12 IBIA 238 (May 16, 1984)

WITNESSES

Observation by Administrative Law Judge

Where testimony is conflicting, the Board normally will not disturb a decision based upon findings as to credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

Estate of Wilma Florence First Youngman, 12 IBIA 219 (Apr. 4, 1984)

INDIAN TRIBES

HUNTING AND FISHING

Off Reservation

Under 25 CFR 249.3 an applicant for a Bureau of Indian Affairs fishing identification card must be a member of a tribe with Federally recognized treaty fishing rights.

Timothy Tarabochia v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 269 (June 6, 1984) 91 I.D. 243

JURISDICTION

Neither the Board of Indian Appeals nor the Department of the Interior has review authority over matters entrusted to state, Federal, or trial courts.

Neither the Board of Indian Appeals nor the Department of the Interior is the proper forum for consideration of questions relating to contrust property held by Indians.

Estate of Alice Rae Sasse, 12 IBIA 281 (June 25, 1984)

MEMBERSHIP

When reopening of a closed Indian estate is sought for the sole purpose of determining the appellant's nationality or Indian status, and no alteration in the distribution of the decedent's estate is sought, reopening will be allowed under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous decisions of the Board of Indian Appeals interpreting that regulation.

Estate of Edward (Agopetah) Bert, 12 IBIA 253 (May 22, 1984) 91 I.D. 235

INDIANS

GENERALLY

When an Indian tribe or member of an Indian tribe appears before the Board of Indian Appeals represented by a person not qualified to appear before the Department of the Interior under 43 CFR 4.1, the party will be informed that the unqualified person may not appear, but will not be penalized for choosing an unqualified representative. Once informed that the chosen representative is unqualified, the Indian party must choose a qualified representative or appear pro se in order for filings to be accepted.

Estate of Benjamin Kent, Sr. (Ben Wawanowayl), 13 IBIA 21 (Aug. 29, 1984)

CITIZENSHIP

American Indians born in Canada have an aboriginal right to pass the boundary between Canada and the United States and to remain in the United States without compliance with any immigration law that would apply to any other alien.

Terese L. Garrett v. Ass't Secretary for Indian Affairs, 13 IBIA 8 (Aug. 21, 1984) 91 I.D. 262

INDIANS--Continued

FISCAL AND FINANCIAL AFFAIRS

Land interests held in Indian trust status by the Department of the Interior are not subject to setoff, levy, and/or execution on the basis of a state court decision.

Estate of Alice Mae Sasse, 12 IBIA 281 (June 25, 1984)

HOUSING

Home Improvement Program Funds

Due process issues would be raised if the Bureau of Indian Affairs were to change an application for Housing Improvement Funds from category D, new housing, to category C, downpayment, without notice to the applicant.

Melvin Antone v. Ass't Secretary--Indian Affairs, 12 IBIA 186 (Mar. 2, 1984)

NONRESTRICTED PROPERTY

Neither the Board of Indian Appeals nor the Department of the Interior is the proper forum for consideration of questions relating to nontrust property held by Indians.

Estate of Alice Mae Sasse, 12 IBIA 281 (June 25, 1984)

LACHES

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Lone Star Steel Co., 79 IBLA 345 (Mar. 22, 1984)

Viking Resources Corp., 80 IBLA 245 (Apr. 30, 1984)

LIEU SELECTIONS

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

A state selecting indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for unsurveyed school sections within a national forest shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of secs. 16 and 36 therein. Where a protraction on which the state relies to make its indemnity selections reveals that a fractional township is present, the state's entitlement to indemnity lands is calculated according to the pro rata rule set forth at 43 U.S.C. § 852 (1976).

Where a survey on which the state relies to make its indemnity selections pursuant to the Act of Feb. 28, 1891, reveals a fractional township with a school section in place, the state's entitlement should

LIEU SELECTIONS--Continued

be in an amount equal to the acreage shown by the surveyed school section or in an amount determined by the pro rata rule at the election of the state.

Until a survey of public lands has been run and approved, the designated sections of a township are undefined and the lands are unidentified.

Where the State of Oregon makes an initial selection of indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed fractional township in a national forest, it is not entitled to additional indemnity lands should a subsequent reprotraction or survey be made of the township.

State of Oregon et al., II, 80 IBLA 354 (May 10, 1984) 91 I.D. 212

Legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Inyo National Forest pursuant to sec. 315 of the Act of Oct. 21, 1976, which parcel was deeded to the Government in 1899 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land to the United States as part of the national forest in which the lands are located.

Andy D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

MATERIALS ACT

The purchaser under a material sales contract who has paid for the right to mine and remove a quantity of scoria, but who has been unable to mine and remove a substantial part of the scoria purchased prior to expiration of the contract, may be entitled to a credit for the appraised value of the scoria purchased but not taken as listed by the pro rata share of the contract price. Where the purchaser remains ready, willing, and able to mine and remove the balance of the scoria purchased, the contract is properly extended or renewed to authorize removal of the balance of the scoria, subject to reappraisal of the value of the remaining scoria, in the absence of a compelling countervailing public interest.

Mobil Oil Corp., 79 IBLA 76 (Feb. 16, 1984)

MINERAL LANDS

DETERMINATION OF CHARACTER OF

In determining whether each 10-acre part of a placer claim is mineral in character, the claim must be subdivided to create square 10-acre parcels, to the extent possible, regardless whether the claim, as laid out on the ground, conforms to the system of public land surveys.

Where the evidence submitted by a Government mineral examiner supports the conclusion that a 10-acre parcel of land in a placer location is not mineral in character, the burden devolves to the mineral claimant to overcome this showing by a preponderance of the

MINERAL LANDS--Continued

DETERMINATION OF CHARACTER OF--Continued

evidence, failing in which that portion shall be declared invalid.

United States v. Robert B. Lara (On Reconsideration), 80 IBLA 215 (Apr. 30, 1984)

BLM must reject a phosphate prospecting permit application filed pursuant to sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982), where the land is determined to be within a known phosphate leasing area.

An applicant for a phosphate prospecting permit under sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982), acquires no vested right to a permit by virtue of an inordinate delay in adjudication of the application, even where a permit might have issued when the application was originally filed.

In rejecting a phosphate prospecting permit application because the land is within a known phosphate leasing area, and thus no longer subject to issuance of a permit, BLM may rely on proof of the existence or workability of minerals in adjacent lands and geological and other surrounding external conditions, and need not engage in drilling or other exploratory work on the ground.

In rejecting a phosphate prospecting permit application, BLM may properly consider a recommendation of the Forest Service that issuance of a permit would not be in the public interest. However, altimate rejection must be supported by facts of record and a reasoned explanation.

Elizabeth B. Archer et al., 82 IBLA 14 (July 5, 1984)

LEASES

The filing of a phosphate prospecting permit application creates no vested rights in the applicant and the application must be rejected if the land described therein is determined by Geological Survey to be within a known phosphate leasing area and to be subject to the competitive leasing provisions of the Mineral Leasing Act. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying phosphate bed, which finding requires competitive leasing of the land.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

Bureau of Land Management properly rejects combination prospecting permit/mineral lease applications for lands within the Whiskeytown Unit of the Whiskeytown-Shasta-Trinity National Recreation Area that are not open to mineral leasing under 43 CFR 3566.2-2.

An application to acquire mineral rights in public lands does not create a property right in the applicant.

Steve D. Mayberry, Mehrle Jennings, Mark Jennings, 82 IBLA 339 (Sept. 12, 1984)

MINERAL RESERVATION

A decision approving a bond filed by a locator of mining claims for reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed in the absence of a showing that the amount of the

MINERAL LANDS--Continued

MINERAL RESERVATION--Continued

bond is inadequate to cover damage to crops, improvements, and the value of the land for grazing purposes.

Robert M. Michael et ux., 79 IBLA 255 (Mar. 5, 1984)

BLM has the jurisdiction to determine whether the terms of a mineral reservation in a deed to the United States has operated to vest title to the mineral estate in the United States by virtue of a failure to comply with an annual production requirement found in the reservation. However, where the record indicates that BLM has not fully considered whether production within a production unit which includes the reserved land serves to extend the reservation, the case will be remanded to BLM for consideration of that question.

Doris A. Slaates et al., 81 IBLA 282 (June 12, 1984)

PROSPECTING PERMITS

An application for a hardrock prospecting permit is properly rejected where the lands described therein do not exist. Applicant bears the responsibility of furnishing a proper land description and BLM is without authority to speculate on applicant's intention or to alter a land description.

A new application for prospecting permit filed pursuant to 43 CFR 3511.2-4 within 30 days of rejection of an earlier application for a curable defect obtains priority as of the date of filing of the new application.

John R. Snedegar, 79 IBLA 201 (Feb. 28, 1984)

The filing of a phosphate prospecting permit application creates no vested rights in the applicant and the application must be rejected if the land described therein is determined by Geological Survey to be within a known phosphate leasing area and to be subject to the competitive leasing provisions of the Mineral Leasing Act. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying phosphate bed, which finding requires competitive leasing of the land.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

Where a prospecting permit application is submitted in less than the required number of approved forms, a curable defect exists, which under provision of 43 CFR 3511.2-4(b) if cured within 30 days, entitles the application to priority as of the date of the curative filing.

W. J. Jewell, 80 IBLA 322 (May 7, 1984)

Extension of a prospecting permit may be properly denied where application is not timely filed and no showings are made, as required by 43 CFR 3511.3-2, as to the reasons why additional time is needed to complete prospecting work.

Inverness Mining Co., 81 IBLA 78 (May 23, 1984)

MINERAL LANDS--Continued

PROSPECTING PERMITS--Continued

An application for a prospecting permit for reserved minerals in former public domain the surface of which is patented to the State of California, is not properly rejected pursuant to 43 CFR Subpart 3564 where it appears the application was not provided to the surface manager for comment prior to adjudication as required by 43 CFR 3564.4.

Elton Elliott et al., 82 IBLA 179 (Aug. 9, 1984)

Bureau of Land Management properly rejects combination prospecting permit/mineral lease applications for lands within the Whiskeytown Unit of the Whiskeytown-Shasta-Trinity National Recreation Area that are not open to mineral leasing under 43 CFR 3566.2-2.

An application to acquire mineral rights in public lands does not create a property right in the applicant.

Steve D. Mayberry, Mehrle Jennings, Mark Jennings, 82 IBLA 339 (Sept. 12, 1984)

MINERAL LEASING ACT

GENERALLY

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

The Board of Land Appeals will not reverse as unreasonable a readjustment of an underground coal lease establishing a royalty of 8 percent, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1976) if needed.

The Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1976), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the amendments.

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, since any authorized use would be subject to the lease.

Mid-Continent Coal & Coke Co., 78 IBLA 178 (Jan. 4, 1984).

An offeror for a Federal oil and gas lease has no rights in the land or its minerals until the lease is issued to it. The Secretary of the Interior is not required to, but "may," issue a lease for any given tract. Therefore, BLM can properly reject a noncompetitive lease offer where the lands are included in a favorable petroleum geological province, which is leasable only through competitive bidding pursuant to the Mineral Leasing Act of 1920, as modified by the Alaska National Interest Lands Conservation Act.

E. B. Joiner, 78 IBLA 323 (Jan. 24, 1984)

MINERAL LEASING ACT--Continued

GENERALLY--Continued

The filing of a phosphate prospecting permit application creates no vested rights in the applicant and the application must be rejected if the land described therein is determined by Geological Survey to be within a known phosphate leasing area and to be subject to the competitive leasing provisions of the Mineral Leasing Act. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying phosphate bed, which finding requires competitive leasing of the land.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

Departmental regulation 43 CFR 3473.3-2(a)(1) and (a)(3) implementing 30 U.S.C. § 207(a) (1976), provides that a royalty rate as low as 5 percent may be established for an underground coal mine at lease issuance if conditions warrant such reduced royalty rate. A BLM decision overruling a coal lessee's objection to a provision in readjusted coal leases establishing a royalty rate of 8 percent will be set aside and reasanded where, on appeal, BLM requests that the Board remand the cases to BLM to allow the lessee the opportunity to establish that the conditions warrant a royalty rate of less than 8 percent.

Utah Power & Light Co., 80 IBLA 180 (Apr. 16, 1984)

Where a coal lease issued prior to Aug. 4, 1976, the date of enactment of the Federal Coal Leasing Amendments Act of 1976, provides that the United States can readjust its terms and conditions at the end of 20 years, notice of readjustment or notice of intent to readjust must be given to the lessee at or before the expiration of that 20-year period.

Notice of intent to readjust a Federal coal lease which notice is received by the lessee on Nov. 16, 1978, for a lease whose 20-year readjustment date expired Oct. 1, 1978, is untimely and readjusted terms and conditions may not be imposed pursuant to such notice.

Pitkin Iron Corp. et al., 81 IBLA 81 (May 24, 1984)

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the lands.

The Board of Land Appeals will not reverse as unreasonable a readjustment of an underground coal lease establishing a royalty of 8 percent, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982) if needed.

The Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the amendments.

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, since any other authorized use would be subject to the lease.

Mid-Continent Coal & Coke Co., 83 IBLA 56 (Sept. 25, 1984)

MINERAL LEASING ACT--Continued

APPLICABILITY

The DOI Fiscal 1981 Appropriations Act authority to lease oil and gas in the National Petroleum Reserve--Alaska (NPR-A) is authority independent of the Mineral Lands Leasing Act of 1920 and applicable to all lands within the boundaries of the NPR-A. The Department sought such authority and the two Appropriations Committees worked to establish such independent authority.

The conclusion that the Appropriations Act is independent leasing authority is not an implied repeal, pro tanto, of the Mineral Leasing Act of 1920 because the Naval Petroleum Reserves Production Act of 1976 explicitly precluded the operation of the MLA on the NPR-A, and the Appropriations Act modified that withdrawal only for the purpose of the oil and gas leasing program authorized in the Appropriations Act.

Authorization for Oil and Gas Leasing on the National Petroleum Reserve--Alaska, M-36940 (Oct. 15, 1981)
91 I.D. 1

COMBINED HYDROCARBON LEASES

BLM has no authority under the Mineral Leasing Act as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 226(b) (1982), to issue a noncompetitive oil and gas lease for land within a designated tar sand area. A noncompetitive lease improvidently issued after the enactment of the amendment in violation of its requirements is properly canceled upon discovery of the error.

Dorothy Langley, 81 IBLA 349 (June 25, 1984)

LANDS SUBJECT TO

An offeror for a Federal oil and gas lease has no rights in the land or its minerals until the lease is issued to it. The Secretary of the Interior is not required to, but "may," issue a lease for any given tract. Therefore, BLM can properly reject a noncompetitive lease offer where the lands are included in a favorable petroleum geological province, which is leaseable only through competitive bidding pursuant to the Mineral Leasing Act of 1920, as modified by the Alaska National Interest Lands Conservation Act.

E. B. Joiner, 78 IBLA 323 (Jan. 24, 1984)

Generally, unless the mineral leasing laws or a withdrawal or reservation order specifically provides otherwise, the lands withdrawn or reserved for a specific purpose are available for leasing under the mineral leasing laws, if issuance of a mineral lease would not be inconsistent with or interfere with the purpose for which the lands are withdrawn or reserved.

The 1984 Continuing Resolution (98 Stat. 151) provides, at sec. 137, that no funds shall be used to process or grant oil and gas lease applications or offers on any Federal lands, outside Alaska, that are units of the National Wildlife Refuge System, except where there are valid existing rights or where the lands are subject to acreage limitations and that the Secretary of the Interior promulgates revisions to the existing regulations so as to explicitly authorize the leasing of such lands; holds a public hearing with respect to such revision; and prepares an environmental impact statement with respect thereto. All action upon affected oil and gas lease applications or offers filed before Nov. 14, 1981, is properly suspended until completion of the necessary steps.

TXO Production Corp., 79 IBLA 81 (Feb. 16, 1984)

MINERAL LEASING ACT--Continued

LANDS SUBJECT TO--Continued

Appurtenant lands acquired by the United States prior to Feb. 25, 1920, from the State of Michigan by operation of Michigan law are subject to the Mineral Leasing Act of 1920.

Sam P. Jones, 81 IBLA 300 (June 13, 1984)

BLM has no authority under the Mineral Leasing Act as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 226(b) (1982), to issue a noncompetitive oil and gas lease for land within a designated tar sand area. A noncompetitive lease improvidently issued after the enactment of the amendment in violation of its requirements is properly canceled upon discovery of the error.

Dorothy Langley, 81 IBLA 349 (June 25, 1984)

MINERAL LEASING ACT FOR ACQUIRED LANDS

CONSENT OF AGENCY

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1976), requires that the consent of the administrative agency having jurisdiction over acquired land described in an oil and gas lease offer be obtained prior to the issuance of a lease for such land. Absent such consent, the Department of the Interior is without authority to issue a lease.

Frederick L. Smith, 78 IBLA 345 (Jan. 25, 1984)

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1976), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease. Where an offeror seeks to lease lands under the jurisdiction of the Department of the Navy, and that Department refuses consent, no lease may issue.

Union Oil Co. of California, Stephen E. Bubala, 79 IBLA 86 (Feb. 16, 1984)

ENVIRONMENT

Analysis of the environmental impact of a proposed prospecting plan under a hardrock mineral prospecting permit issued pursuant to 16 U.S.C. § 520 (1976) should properly consider the potential cumulative impact of increased vehicular traffic on an access road due to prospecting activity under the permit and related activity on adjacent mining claims.

A finding that a proposed action will not have a significant impact on the environment, and that hence no environmental impact statement is required, will be affirmed on appeal where the record establishes that a hard look has been taken at environmental problems, that relevant areas of environmental concern have been identified, and the determination is the reasonable result of the environmental analysis.

John A. Nejedly, Contra Costa Youth Ass'n, 80 IBLA 14 (Mar. 28, 1984)

MINERAL LEASING ACT FOR ACQUIRED LANDS--Continued

LANDS SUBJECT TO

BLM must cancel a noncompetitive oil and gas lease of acquired lands where it is determined after lease issuance that the lands are situated within the boundaries of an incorporated city. Such lands are not subject to oil and gas leasing under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (Supp. V 1981).

Robert Lynn, 78 IBLA 232 (Jan. 9, 1984)

Generally, unless the mineral leasing laws or a withdrawal or reservation order specifically provides otherwise, the lands withdrawn or reserved for a specific purpose are available for leasing under the mineral leasing laws, if issuance of a mineral lease would not be inconsistent with or interfere with the purpose for which the lands are withdrawn or reserved.

The 1984 Continuing Resolution (98 Stat. 151) provides, at sec. 117, that no funds shall be used to process or grant oil and gas lease applications or offers on any Federal lands, outside Alaska, that are units of the National Wildlife Refuge System, except where there are valid existing rights or where the lands are subject to drainage, unless and until the Secretary of the Interior promulgates revisions to the existing regulations so as to explicitly authorize the leasing of such lands; holds a public hearing with respect to such revision; and prepares an environmental impact statement with respect thereto. All action upon affected oil and gas lease applications or offers filed before Nov. 14, 1983, is properly suspended until completion of the necessary steps.

TXO Production Corp., 79 IBLA 81 (Feb. 16, 1984)

Acquired lands situated within the boundaries of incorporated cities, towns, or villages are excluded from leasing under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1976).

Jerry Waters, 79 IBLA 198 (Feb. 28, 1984)

Acquired lands situated within the boundaries of incorporated cities, towns, or villages are excluded from mineral leasing by sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1982).

Jerald A. Waters, 82 IBLA 334 (Sept. 12, 1984)

MINING CLAIMS

GENERALLY

Lands segregated on the public records by a Recreational and Public Purposes lease are not available for the location of mining claims, but a claimant may establish the exterior boundaries of a lode claim on land under a Recreation and Public Purposes lease, with the permission of the lessee, for the purpose of staking end lines parallel so as to obtain extralateral rights to a vein or lode discovered on lands available for location.

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond

MINING CLAIMS--Continued

GENERALLY--Continued

or adjacent to that land which is closed to mineral entry.

Santa Fe Mining, Inc., 79 IBLA 48 (Feb. 9, 1984)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1782(c) (1976), requires the Secretary to regulate mining operations in lands under wilderness review to prevent impairment of the suitability of these areas for prospective or potential inclusion in the wilderness system. Where a proposed mining plan of operation on such land calls for the use of mechanized earthmoving equipment to clear a new area and the creation of new roads in new areas, BLM properly rejected the plan.

Mining operations in lands under wilderness review may continue even if they are determined to be impairing wilderness values if the operations are occurring in the same manner and degree that they were being conducted on Oct. 21, 1976. Mining activities not exceeding that manner and degree shall be regulated only to prevent undue and unnecessary degradation of public lands. However, the existence of mining operations actually being conducted on the land on Oct. 21, 1976, and not mere statutory right to use, is required to authorize subsequent mining activities in the same manner and degree.

Doyle Cape, 79 IBLA 204 (Feb. 28, 1984)

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Comstock Tunnel & Drainage Co., Sutro Tunnel Co., 79 IBLA 237 (Mar. 1, 1984)

In the absence of specific evidence that a mining claim location notice dated subsequent to the date of withdrawal of the land upon which the claim was located was intended to be an amendment, rather than a relocation, of a claim located prior to the withdrawal, a mining claimant cannot relate the date of a location to an earlier location and thus validate a claim which would otherwise be considered null and void ab initio.

John C. Neill, 80 IBLA 39 (Mar. 28, 1984)

Federal law requires that mining locations be made in good faith for the purpose of mining, processing, or prospecting for valuable minerals. Title to mineral lands cannot be acquired by occupancy unless for the prime purpose of mining and extracting minerals. Even if a discovery could be shown to exist, proof of bad faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed.

United States v. Jon Tiesens, Claire Kelly, 81 IBLA 41 (May 17, 1984)

MINING CLAIMS--Continued

GENERALLY--Continued

Where a lode mining claim is located partially on withdrawn lands, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the withdrawn lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Marvin F. Johnston, 81 IBLA 295 (June 12, 1984)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Western Nuclear, Inc., 82 IBLA 67 (July 12, 1984)

With respect to an interim conveyance of land to a Native corporation pursuant to sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), the statute does not provide for the reservation of a private right of access to a mining claim, but such right of access is protected as a valid existing right under sec. 17(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1616(b)(2) (1976).

Herbert L. Stewart, Donald J. Ferguson, 82 IBLA 329 (Sept. 7, 1984)

A perfected but unpatented mining claim is property in the fullest sense of the word, and its ownership, transfer, and use are governed by well-defined code or codes of law, and are recognized by states and the Federal Government.

California Portland Cement Corp., 83 IBLA 11 (Sept. 18, 1984)

ABANDONMENT

A presumption of regularity supports the official acts of public officers and absent clear evidence to the contrary, it will be presumed that they have properly discharged their official duties. Suggestion that BLM may not have investigated a mining claimant's good faith in locating a claim which includes a water source is insufficient to rebut the presumption of regularity.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

CONTESTS

When the Government contests the validity of a mining claim on the basis of lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which is sufficient to overcome the Government's showing on those issues raised.

Where the Government fails to present sufficient evidence to establish a prima facie case, the claimant need not present evidence in order to prevail. If a claimant, however, does present evidence, the determination of the validity of a claim must be made on the basis of the record as a whole, and not just a part

MINING CLAIMS--Continued

CONTESTS--Continued

of the record. A claimant need not affirmatively establish the existence of a discovery where there has been no prima facie case. The only risk that the claimant runs in such a situation is the risk that the evidence as a whole will establish by a preponderance of the evidence that an element of discovery is not present.

United States v. Eva M. Pool et al., 78 IBLA 215 (Jan. 6, 1984)

In a mining contest initiated by the United States, there is no requirement that the contestee offer evidence concerning matters not placed in issue by the United States. Where the Administrative Law Judge incorrectly states a contrary rule, but in practice applies the correct standard, his decision is affirmed.

In a mining contest initiated by the United States where the Government mineral examiners testify they have examined the mineral claims at issue and found no evidence of mineralization to support a discovery, a prima facie case for the Government is established. This showing is not overcome by evidence of ore sample values offered by contestee to show mineralization, where contestee fails to show from which, of 10 claims at issue, the samples were taken.

Cactus Mines Ltd., 79 IBLA 20 (Feb. 3, 1984)

Under 5 U.S.C. § 504 (1982) and 43 CFR 4.601, 48 FR 17596 (Apr. 25, 1983), an adversary adjudication is one required by statute to be conducted by the Secretary under 5 U.S.C. § 554 (1982). Because there is no statutory requirement that a mining claim contest be conducted under 5 U.S.C. § 554 (1982), mining claim contests are not proceedings covered by Equal Access to Justice Act.

Kaycee Bentonite Corp., 79 IBLA 182 (Feb. 28, 1984) 91 I.D. 138

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

Where a qualified expert, hired by mining claimants to evaluate contested claims, informs a Government mineral examiner that certain claims have no mineral values, the mineral examiner has no affirmative obligation to sample those claims. Testimony of the Government mineral examiner as to this conversation, unless impeached in cross-examination, is sufficient to establish a prima facie case that those claims are invalid.

Where the Government has acquired a lease of lands embraced in a mining claim, and the evidence establishes that, during the term of this lease, access to lower workings has become impossible, it is the responsibility of the Government to restore access to the conditions existing prior to lease in order to permit sampling of a mineral deposit when the claimant alleges that values existed at depths which are no longer accessible. Where the Government fails to do so, the claimant's assertions of values at depth must be presumed to be true.

United States v. Janet B. Copple et al., 81 IBLA 109 (May 30, 1984)

MINING CLAIMS--Continued

CONTESTS--Continued

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quality of the minerals insufficient to support a finding of discovery based on conventional methods of mining, a prima facie case is established. A contestee may overcome the prima facie case by probative evidence that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing the quality and quantity of minerals found by specialized mining methods.

United States v. Carl Dresselhaus et al., 81 IBLA 252 (June 8, 1984)

Where the United States contests a mining claim for lack of discovery of a valuable deposit, it has the burden of going forward to establish a prima facie case as to that charge; the mining claimant has the ultimate burden of overcoming, by a preponderance of the evidence, the Government's case. A prima facie case is established by the testimony of an expert witness who has examined the mineral deposits on the claim and the costs of mining those deposits, and concludes that the mineral deposits cannot be mined, removed, and marketed at a profit.

United States v. Albert O. Husman et al., 81 IBLA 271 (June 8, 1984)

In a mining claim contest, the Government establishes a prima facie case of invalidity sufficient to shift the burden of proving otherwise to the claimant where the Government mineral examiner testifies that he has examined the claim and can find no evidence of mineralization or where he cannot examine the claim because it is covered with snow and ice.

United States v. Albert F. Parker et al., 82 IBLA 344 (Sept. 12, 1984) 91 I.D. 271

DETERMINATION OF VALIDITY

When the Government contests the validity of a mining claim on the basis of lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which is sufficient to overcome the Government's showing on those issues raised.

Where the Government fails to present sufficient evidence to establish a prima facie case, the claimant need not present evidence in order to prevail. If a claimant, however, does present evidence, the determination of the validity of a claim must be made on the basis of the record as a whole, and not just a part of the record. A claimant need not affirmatively establish the existence of a discovery where there has been no prima facie case. The only risk that the claimant runs in such a situation is the risk that the evidence as a whole will establish by a preponderance of the evidence that an element of discovery is not present.

United States v. Eva M. Pool et al., 78 IBLA 215 (Jan. 6, 1984)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A placer mining claim located for gold on land previously withdrawn from appropriation under the mining laws relating to metalliferous minerals by Public Land Order No. 4522, dated Sept. 13, 1968, is null and void ab initio.

Charles H. Phillips, 78 IBLA 320 (Jan. 24, 1984)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal in the official BLM records is null and void ab initio.

Lamar & Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

In a mining contest initiated by the United States, there is no requirement that the contestee offer evidence concerning matters not placed in issue by the United States. Where the Administrative Law Judge incorrectly states a contrary rule, but in practice applies the correct standard, his decision is affirmed.

In a mining contest initiated by the United States where the Government mineral examiners testify they have examined the mineral claims at issue and found no evidence of mineralization to support a discovery, a prima facie case for the Government is established. This showing is not overcome by evidence of ore sample values offered by contestee to show mineralization, where contestee fails to show from which, of 10 claims at issue, the samples were taken.

Cactus Mines Ltd., 79 IBLA 20 (Feb. 3, 1984)

The validity of a mining claim on the issue of discovery of a valuable mineral deposit is not legally cognizable in a head protest proceeding initiated by the surface owner under a Stock-Raising Homestead Act patent. Such a validity determination requires initiation of a contest with notice to the claimant and an opportunity for a hearing.

Robert W. Michael et ux., 79 IBLA 255 (Mar. 5, 1984)

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

Where the Government has acquired a lease of lands embraced in a mining claim, and the evidence establishes that, during the term of this lease, access to lower workings has become impossible, it is the responsibility of the Government to restore access to the conditions existing prior to lease in order to permit sampling of a mineral deposit when the claimant alleges that values existed at depths which are no longer accessible. Where the Government fails to do so, the claimant's assertions of values at depth must be presumed to be true.

United States v. Janet B. Copple et al., 81 IBLA 109 (May 30, 1984)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

Where a mineral claimant has located a group of claims, he must show a discovery on each claim. Geologic inference alone may not be used to show the existence of a mineral deposit; there must be an exposure of minerals of value.

United States v. Carl Dresselhaus et al., 81 IBLA 252 (June 8, 1984)

Where the United States contests a mining claim for lack of discovery of a valuable deposit, it has the burden of going forward to establish a prima facie case as to that charge; the mining claimant has the ultimate burden of overcoming, by a preponderance of the evidence, the Government's case. A prima facie case is established by the testimony of an expert witness who has examined the mineral deposits on the claim and the costs of mining those deposits, and concludes that the mineral deposits cannot be mined, removed, and marketed at a profit.

United States v. Albert O. Husman et al., 81 IBLA 271 (June 8, 1984)

In a mining claim contest, the Government establishes a prima facie case of invalidity sufficient to shift the burden of proving otherwise to the claimant where the Government mineral examiner testifies that he has examined the claim and can find no evidence of mineralization or where he cannot examine the claim because it is covered with snow and ice.

Assay reports have limited probative value concerning the existence of a valuable mineral deposit on a mining claim when they are not supported by sufficient evidence to show how and where the samples were taken.

In a placer mining claim contest, a claimant overcomes the Government's prima facie case of invalidity based on the absence of significant visible gold in pan samples where he submits evidence of samples with gold values above the cutoff identified by the Government mineral examiner for a successful placer mining operation.

In a mining claim contest, where a mineral claimant presents more persuasive evidence than the Government with respect to the location of a mining claim on the ground by testimony with respect to the location of certain monuments placed on the ground by the locators of the claim such that the claim encompasses significant mineralization, he overcomes the Government's prima facie case of invalidity based on the absence of mineralization.

United States v. Albert F. Parker et al., 82 IBLA 344 (Sept. 12, 1984) 91 I.D. 271

DISCOVERY

Generally

When the Government contests the validity of a mining claim on the basis of lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which is sufficient to overcome the Government's showing on those issues raised.

Where the Government fails to present sufficient evidence to establish a prima facie case, the claimant need not present evidence in order to prevail. If a claimant, however, does present evidence, the determination of the validity of a claim must be made on the basis of the record as a whole, and not just a part

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

of the record. A claimant need not affirmatively establish the existence of a discovery where there has been no prima facie case. The only risk that the claimant runs in such a situation is the risk that the evidence as a whole will establish by a preponderance of the evidence that an element of discovery is not present.

United States v. Eva B. Pool et al., 78 IBLA 215 (Jan. 6, 1984)

The validity of a mining claim on the issue of discovery of a valuable mineral deposit is not legally cognizable in a bond protest proceeding initiated by the surface owner under a Stock-Raising Homestead Act patent. Such a validity determination requires initiation of a contest with notice to the claimant and an opportunity for a hearing.

Robert N. Michael et ux., 79 IBLA 255 (Mar. 5, 1984)

Where lands have been withdrawn from mineral entry, any mining location on such land which is not then supported by a discovery of a valuable mineral deposit must be deemed invalid, even if such a discovery is made at a later date.

United States v. Janet P. Copple et al., 81 IBLA 109 (May 30, 1984)

The discovery of a "valuable mineral deposit" has been made where a claimant establishes the presence of locatable minerals and the evidence is of such a character that a person of ordinary prudence would be justified in the expenditure of his labors and means, with a reasonable prospect of success in developing a valuable mine. The record must establish that the locatable mineral can be mined, removed, and marketed at a profit.

United States v. Albert O. Husman et al., 81 IBLA 271 (June 8, 1984)

In a mining claim contest, the Government establishes a prima facie case of invalidity sufficient to shift the burden of proving otherwise to the claimant where the Government mineral examiner testifies that he has examined the claim and can find no evidence of mineralization or where he cannot examine the claim because it is covered with snow and ice.

Assay reports have limited probative value concerning the existence of a valuable mineral deposit on a mining claim when they are not supported by sufficient evidence to show how and where the samples were taken.

In a placer mining claim contest, a claimant overcomes the Government's prima facie case of invalidity based on the absence of significant visible gold in pan samples where he submits evidence of samples with gold values above the cutoff identified by the Government mineral examiner for a successful placer mining operation.

In a mining claim contest, where a mineral claimant presents more persuasive evidence than the Government with respect to the location of a mining claim on the ground by testimony with respect to the location of certain monuments placed on the ground by the locators of the claim such that the claim encompasses significant mineralization, he overcomes the

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

Government's prima facie case of invalidity based on the absence of mineralization.

United States v. Albert F. Parker et al., 82 IBLA 344 (Sept. 12, 1984) 91 I.D. 271

Geologic Inference

Where a mineral claimant has located a group of claims, he must show a discovery on each claim. Geologic inference alone may not be used to show the existence of a mineral deposit; there must be an exposure of minerals of value.

United States v. Carl Dresselhaus et al., 81 IBLA 252 (June 8, 1984)

Marketability

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Janet R. Copple et al., 81 IBLA 109 (May 30, 1984)

ENVIRONMENT

A finding that proposed mining operations will not have a significant impact on the human environment, and that hence no environmental impact statement is required, will be affirmed on appeal where the record establishes that relevant areas of environmental concern have been identified, particularly the effect of excessive stream turbidity due to sediment runoff on fish populations and habitat and local water use, and the determination is the reasonable result of the environmental analysis in light of proposed measures to minimize the environmental impact.

Billie S. Tucker et al., 82 IBLA 324 (Sept. 7, 1984)

EXTRALATERAL RIGHTS

A withdrawal from the operation of the general mining laws does not deprive a claimant of the right to exercise extralateral rights within the withdrawn lands if those extralateral rights are derived from ownership of valid lode mining claims located prior to the withdrawal. The ownership of ores and minerals by virtue of extralateral rights stemming from valid lode mining claims located prior to withdrawal is not divested by the withdrawal.

Anthony Juskiewicz, 79 IBLA 267 (Mar. 7, 1984)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Arthur Wallace, Inc., 82 IBLA 67 (July 12, 1984)

MINING CLAIMS--Continued

HEARINGS

In a mining contest initiated by the United States, there is no requirement that the contestee offer evidence concerning matters not placed in issue by the United States. Where the Administrative Law Judge incorrectly states a contrary rule, but in practice applies the correct standard, his decision is affirmed.

In a mining contest initiated by the United States where the Government mineral examiners testify they have examined the mineral claims at issue and found no evidence of mineralization to support a discovery, a prima facie case for the Government is established. This showing is not overcome by evidence of ore sample values offered by contestee to show mineralization, where contestee fails to show from which, of 10 claims at issue, the samples were taken.

Cactus Mines Ltd., 79 IBLA 20 (Feb. 3, 1984)

LANDS SUBJECT TO

Where a patent has been issued for the lands on which a claim is situated it is proper for BLM to refuse recordation of the claim, since it has no jurisdiction over the claim.

Henry J. Hudspeth, Sr., Betty A. Hudspeth, 78 IBLA 235 (Jan. 9, 1984)

A placer mining claim located for gold on land previously withdrawn from appropriation under the mining laws relating to metalliferous minerals by Public Land Order No. 4522, dated Sept. 13, 1968, is null and void ab initio.

Charles W. Phillips, 78 IBLA 320 (Jan. 24, 1984)

A mining claim located at a time the land is withdrawn from appropriation by the Act of May 29, 1928, is null and void ab initio. It is immaterial whether future revocation of the withdrawal is being considered.

Samuel P. Speerstra, 78 IBLA 343 (Jan. 24, 1984)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal in the official BLM records is null and void ab initio.

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and remanded for appropriate action.

Lamar & Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

A mining claim lying entirely on lands previously patented under the Recreation and Public Purposes Act is null and void ab initio because such lands are not open to mineral entry.

Cruz G. Velasquez, Armando Sanchez, 78 IBLA 355 (Jan. 25, 1984)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Lands segregated on the public records by a Recreational and Public Purposes lease are not available for the location of mining claims, but a claimant may establish the exterior boundaries of a lode claim on land under a Recreation and Public Purposes lease, with the permission of the lessee, for the purpose of making end lines parallel so as to obtain extralateral rights to a vein or lode discovered on lands available for location.

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Santa Fe Mining, Inc., 79 IBLA 48 (Feb. 9, 1984)

A mining claim whose discovery is located on land segregated and closed to mineral entry by notation of receipt of an application for withdrawal is properly declared null and void ab initio.

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundaries may be laid within or across the surface of withdrawn land for the purposes of claiming that portion of the ground within the end lines and side lines of the claim which has not been withdrawn and securing extralateral rights to the lode deposit to the extent that such extralateral rights are to ores within the ground which has not been withdrawn.

Marilyn Dutton Hansen, 79 IBLA 214 (Feb. 28, 1984)

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Comstock Tunnel & Drainage Co., Sutro Tunnel Co., 79 IBLA 237 (Mar. 1, 1984)

A locator whose discovery is on lands open to location may extend the end lines and side lines of a lode mining claim across patented or withdrawn lands to define extralateral rights to lodes or veins apexing within that portion of the claim subject to location. This principle permits development of unappropriated mineral in irregular parcels of lands in compliance with the statutory requirements for parallel end lines.

Anthony Waskiewicz, 79 IBLA 267 (Mar. 7, 1984)

BLM may properly declare a mining claim null and void ab initio where located on land segregated from mineral entry on the date of location by a small tract classification order.

J. S. Bowers, 79 IBLA 298 (Mar. 20, 1984)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Where on appeal the Board determines that, in declaring a millsite claim null and void ab initio because it was located on land which had been patented to the state, BLM mistakenly fixed the situs of the claim and that the claim is actually on land open to entry, the Board will reverse the BLM decision.

Savage Construction Co., Inc., 79 IBLA 389 (Mar. 27, 1984)

A mining claim located upon lands withdrawn from mineral entry by a Secretarial order for the benefit of the Mission Indians is properly declared null and void ab initio.

Robert E. Dawson, Kenneth E. Dawson, 80 IBLA 99 (Apr. 3, 1984)

BLM may not declare a mining claim located on land subject to a State indemnity selection application null and void ab initio because of the segregative effect arising from the filing of the application pursuant to 43 CFR 2091.2-6 where the state's application was filed prior to promulgation of the regulation.

James E. Houghton, Wm. A. Houghton, 80 IBLA 195 (Apr. 24, 1984)

Mining claims located on lands that are withdrawn from location are null and void ab initio.

Howard J. Hunt, Howard E. Hunt, 80 IBLA 396 (May 14, 1984)

A mining claim wholly located on land which has been segregated from mineral location by the filing of a state school land indemnity selection application is properly declared null and void ab initio.

When Arizona filed its original application for selection of land as part of its entitlement to compensation for deficiencies for school trust lands pursuant to its enabling act, the Department did not have segregation authority to protect the selections during the promulgation of 43 CFR 2091.2-6, Arizona submitted a request to have the previous applications withdrawn, consolidated, and amended to include additional lands. This will be deemed a reapplication under the circumstances of this case, the filing of which enabled the Department to segregate the lands described therein under 43 CFR 2091.2-6. Mining claims subsequently initiated on lands that were segregated by the reapplication were properly declared null and void ab initio.

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundary lines may be laid within or across the surface of withdrawn or segregated land, solely for the purpose of claiming unappropriated ground within the end lines to secure the extralateral rights to lode deposits apexing in the unappropriated portion of the claim. Therefore, those portions of the claims thus situated on the segregated lands are not properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

The Recreation and Public Purposes Act makes reserved minerals subject to disposition only under applicable laws and such regulations as the Secretary may prescribe. In the absence of such regulations, land under patent pursuant to the Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 - 869-4 (1976), is not open to location under the mining laws.

George Schultz et al., 81 IBLA 29 (May 17, 1984)

Land which has been patented without a reservation of minerals to the United States is not available for location of mining claims, and mining claims located on such land after it is so patented are null and void ab initio.

Donald W. Hoar, 81 IBLA 74 (May 23, 1984)

Donly Gray, 82 IBLA 46 (July 11, 1984)

Mining claims located for trace minerals on land previously withdrawn from mineral entry by Exec. Order No. 5327, as to nonmetalliferous minerals, and Public Land Order No. 4522, as to metalliferous minerals, are properly declared null and void ab initio.

Mineral Life Corp., 81 IBLA 103 (May 30, 1984)

A mining claim whose discovery is located on land segregated and closed to mineral entry by notation of receipt of an application for withdrawal is properly declared null and void ab initio.

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundary lines may be laid within or across the surface of withdrawn or segregated land for the purpose of claiming that portion of the ground within the end lines and side lines of the claim which has not been withdrawn and securing extralateral rights to the lode deposit apexing within the portion of the claim subject to location.

Lloyd R. Mechan, 81 IBLA 239 (June 6, 1984)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims, and mining claims located on such land after it is so patented are null and void ab initio.

All-Kee Associates, 81 IBLA 288 (June 12, 1984)

BLM may properly declare lode mining claims located wholly on land within the Lake Mead National Recreation Area, established pursuant to the Act of Oct. 8, 1964, 16 U.S.C. § 460n (1982), null and void ab initio because such land is implicitly withdrawn from mineral entry.

Where a lode mining claim is located partially on withdrawn lands, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the withdrawn lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Martin F. Johnston, 81 IBLA 295 (June 12, 1984)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A mining claim located on land segregated from such location by the filing of a state selection application is properly declared null and void ab initio; however, where the case record is unclear whether the land embraced by the claim was segregated by an application predating the location or whether the land was segregated by an amendment to the application filed subsequent to the location, the decision will be set aside and the case remanded.

Elizabeth S. Hjelles et al., 81 IBLA 341 (June 21, 1984)

Elsie May Staude, 82 IBLA 226 (Aug. 22, 1984)

Mining claims located on land previously withdrawn from mineral entry by a Secretarial order of Dec. 14, 1904, pursuant to sec. 3 of the Act of June 17, 1902, are properly declared null and void ab initio. Therefore, no property rights are created. It is immaterial whether the lands are or have been used for the purpose for which they were withdrawn.

Homer Owens, 81 IBLA 402 (June 29, 1984)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Western Nuclear, Inc., 82 IBLA 67 (July 12, 1984)

The Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 - 869-4 (1982), makes reserved minerals subject to disposition only under applicable laws and such regulations as the Secretary may prescribe. In the absence of such regulations, land classified for disposition and under lease pursuant to the Recreation and Public Purposes Act is not open to location under the mining laws.

E. D. Fengehr, 82 IBLA 162 (Aug. 6, 1984)

Where lands were patented to a railroad under a statute which authorized the granting of nonmineral lands only, the issuance of the patent generally constituted a conclusive determination by the United States of the nonmineral character of the land so patented, and the subsequent discovery of mineral values therein does not operate to void the conveyance by the United States. Where such land has been reconveyed to the United States subject to a reservation of all minerals to the private grantor, the land is not subject to the subsequent location of mining claims under the general mining laws.

Lode mining claims located entirely on lands which are not subject to mineral entry at the time of their location are properly declared null and void ab initio without a hearing. However, where lode claims are partially located on land which is then not subject to mineral entry, they may not summarily be declared null and void ab initio to the extent of those portions of the claims which embrace lands not available to mineral entry, as lode claims may be projected onto such lands in order to configure the claim boundaries so as to secure extralateral rights.

Moise & Loop Berger, 82 IBLA 253 (Aug. 28, 1984)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A mining claim located on land segregated from such location by the filing of a state selection application is properly declared null and void ab initio.

Ronald R. Kotowski, 82 IBLA 317 (Sept. 6, 1984)

LOCATION

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundaries may be laid within or across the surface of withdrawn land for the purposes of claiming that portion of the ground within the end lines and side lines of the claim which has not been withdrawn and securing extralateral rights to the lode deposit to the extent that such extralateral rights are to ores within the ground which has not been withdrawn.

Marilyn Dutton Hansen, 79 IBLA 214 (Feb. 28, 1984)

A locator whose discovery is on lands open to location may extend the end lines and side lines of a lode mining claim across patented or withdrawn lands to define extralateral rights to lodes or veins apexing within that portion of the claim subject to location. This principle permits development of unappropriated mineral in irregular parcels of lands in compliance with the statutory requirements for parallel end lines.

Anthony Juskiewicz, 79 IBLA 267 (Mar. 7, 1984)

In the absence of specific evidence that a mining claim location notice dated subsequent to the date of withdrawal of the land upon which the claim was located was intended to be an amendment, rather than a relocation, of a claim located prior to the withdrawal, a mining claimant cannot relate the date of a location to an earlier location and thus validate a claim which would otherwise be considered null and void ab initio.

John C. Neill, 80 IBLA 39 (Mar. 28, 1984)

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundary lines may be laid within or across the surface of withdrawn or segregated land, solely for the purpose of claiming unappropriated ground within the end lines to secure the extralateral rights to lode deposits apexing in the unappropriated portion of the claim. Therefore those portions of the claims thus situated on the segregated lands are not properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

Federal law requires that mining locations be made in good faith for the purpose of mining, processing, or prospecting for valuable minerals. Title to mineral lands cannot be acquired by occupancy unless for the prize purpose of mining and extracting minerals. Even if a discovery could be shown to exist, proof of bad faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed.

United States v. Jon Zimmers, Claire Kelly, 81 IBLA 41 (May 17, 1984)

MINING CLAIMS--Continued

LOCATION--Continued

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundary lines may be laid within or across the surface of withdrawn or segregated land for the purpose of claiming that portion of the ground within the end lines and side lines of the claim which has not been withdrawn and securing extralateral rights to the lode deposit apexing within the portion of the claim subject to location.

Lloyd L. Mechan, 81 IBLA 239 (June 6, 1984)

Lode mining claims located entirely on lands which are not subject to mineral entry at the time of their location are properly declared null and void ab initio without a hearing. However, where lode claims are partially located on land which is then not subject to mineral entry, they may not summarily be declared null and void ab initio to the extent of those portions of the claims which embrace lands not available to mineral entry, as lode claims may be projected onto such lands in order to configure the claim boundaries so as to secure extralateral rights.

Moise & Leon Berger, 82 IBLA 253 (Aug. 28, 1984)

LODE CLAIMS

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundaries may be laid within or across the surface of withdrawn land for the purposes of claiming that portion of the ground within the end lines and side lines of the claim which has not been withdrawn and securing extralateral rights to the lode deposit to the extent that such extralateral rights are to ores within the ground which has not been withdrawn.

Marilyn Dutton Hansen, 79 IBLA 214 (Feb. 28, 1984)

A locator whose discovery is on lands open to location may extend the end lines and side lines of a lode mining claim across patented or withdrawn lands to define extralateral rights to lodes or veins apexing within that portion of the claim subject to location. This principle permits development of unappropriated mineral in irregular parcels of lands in compliance with the statutory requirements for parallel end lines.

Anthony Juskiewicz, 79 IBLA 267 (Mar. 7, 1984)

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundary lines may be laid within or across the surface of withdrawn or segregated land, solely for the purpose of claiming unappropriated ground within the end lines to secure the extralateral rights to lode deposits apexing in the unappropriated portion of the claim. Therefore, those portions of the claims thus situated on the segregated lands are not properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

If the discovery on which location of a lode mining claim is based is on unappropriated land, exterior boundary lines may be laid within or across the surface of withdrawn or segregated land for the purpose of claiming that portion of the ground within the end lines and side lines of the claim which has not been withdrawn and securing extralateral rights to the

MINING CLAIMS--Continued

LODE CLAIMS--Continued

lode deposit apexing within the portion of the claim subject to location.

Lloyd J. Meehan, 81 IBLA 239 (June 6, 1984)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extra-lateral rights to lodes or veins which apex within the claim.

Western Nuclear, Inc., 82 IBLA 67 (July 12, 1984)

Lode mining claims located entirely on lands which are not subject to mineral entry at the time of their location are properly declared null and void ab initio without a hearing. However, where lode claims are partially located on land which is then not subject to mineral entry, they may not summarily be declared null and void ab initio to the extent of those portions of the claims which embrace lands not available to mineral entry, as lode claims may be projected onto such lands in order to configure the claim boundaries so as to secure extralateral rights.

Noise & Leon Berger, 82 IBLA 253 (Aug. 28, 1984)

PATENT

Failure of the holder of a mining claim to file an adverse claim within the 60-day publication period set forth in 30 U.S.C. §§ 29, 30 (1976) amounts to a waiver of any rights to a claim against the mineral patent applicant for a conflicting claim.

Lee Brothers Drilling Co., 79 IBLA 330 (Mar. 21, 1984)

Effect must be given, if possible, to every word, clause, and sentence in a statute. Therefore, the application of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), to mineral patent must be made in a manner which recognizes valid existing rights of a mineral claimant at the time of passage of the Act.

California Portland Cement Corp., 83 IBLA 11 (Sept. 18, 1984)

PLACER CLAIMS

In determining whether each 10-acre part of a placer claim is mineral in character, the claim must be subdivided to create square 10-acre parcels, to the extent possible, regardless whether the claim, as laid out on the ground, conforms to the system of public land surveys.

Where the evidence submitted by a Government mineral examiner supports the conclusion that a 10-acre parcel of land in a placer location is not mineral in character, the burden devolves to the mineral claimant to overcome this showing by a preponderance of the evidence, failing in which that portion shall be declared invalid.

United States v. Robert B. Lara (On Reconsideration), 80 IBLA 215 (Apr. 30, 1984)

MINING CLAIMS--Continued

POSSESSORY RIGHT

Under the provisions of 30 U.S.C. § 38 (1976), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. Where, following a hearing, the record does not support a finding that the claimants had held and worked the claim for the 2 years required under Nevada law between 1948 and 1953 when the land was open to the operation of the mining laws, the application for patent is properly rejected and the mining claim declared invalid.

Ernest Higbee et al. (On Reconsideration), 79 IBLA 380 (Mar. 27, 1984)

The Department does not have jurisdiction to consider the relative superiority of the possessory rights of rival mineral claimants to the same ground. A final decision by a court of competent jurisdiction resolves all questions regarding such conflicting rights.

Harvey A. Clifton, 80 IBLA 96 (Apr. 3, 1984)

Federal law requires that mining locations be made in good faith for the purpose of mining, processing, or prospecting for valuable minerals. Title to mineral lands cannot be acquired by occupancy unless for the prime purpose of mining and extracting minerals. Even if a discovery could be shown to exist, proof of bad faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed.

United States v. Jon Zimmers, Claire Kelly, 81 IBLA 41 (May 17, 1984)

POWERSITE LANDS

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and remanded for appropriate action.

Lamar & Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a power project is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1976), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

J. W. Roberts, Jean Roberts, 79 IBLA 279 (Mar. 16, 1984)

Under the Mining Claims Rights Restoration Act of 1955 it is proper to prohibit all placer mining operations on a mining claim located on land withdrawn for power development or powersite where unrestricted placer mining on such land would result in substantial interference with the use of the land for recreation or other purposes.

The Mining Claims Rights Restoration Act of 1955 gives the Secretary of the Interior no discretion to permit limited or restricted placer mining on land withdrawn or reserved for power development or powersites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which

MINING CLAIMS--Continued

POWERSITE LANDS--Continued

he may impose on permission to mine is that after placer mining the locator must restore the surface of the claim to its condition immediately prior to mining operations.

United States v. Robert R. Evans, 82 IBLA 155 (July 31, 1984)

RECORDATION

Where a patent has been issued for the lands on which a claim is situated it is proper for BLM to refuse recordation of the claim, since it has no jurisdiction over the claim.

Henry J. Hudspeth, Sr., Betty A. Hudspeth, 78 IBLA 235 (Jan. 9, 1984)

For purposes of recordation under sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), the filing of notices of location, evidencing a date of location subsequent to the time at which mining claim location notices for the same land were declared null and void ab initio, together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of the Act.

George Schultz et al., 81 IBLA 29 (May 17, 1984)

RELOCATION

A relocator has no rights by relation to the date and priority of the title which he has destroyed by his relocation.

Henry J. Hudspeth, Sr., Betty A. Hudspeth, 78 IBLA 235 (Jan. 9, 1984)

SURFACE USES

A decision approving a bond filed by a locator of mining claims for reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed in the absence of a showing that the amount of the bond is inadequate to cover damage to crops, improvements, and the value of the land for grazing purposes.

Robert G. Michael et ux., 79 IBLA 255 (Mar. 5, 1984)

A locator whose discovery is on lands open to location may extend the end lines and side lines of a lode mining claim across patented or withdrawn lands to define extralateral rights to lodes or veins apexing within that portion of the claim subject to location. This principle permits development of unappropriated mineral in irregular parcels of lands in compliance with the statutory requirements for parallel end lines.

Anthony Juskiewicz, 79 IBLA 267 (Mar. 7, 1984)

Federal law requires that mining locations be made in good faith for the purpose of mining, processing, or prospecting for valuable minerals. Title to mineral lands cannot be acquired by occupancy unless for the prime purpose of mining and extracting minerals. Even if a discovery could be shown to exist, proof of bad

MINING CLAIMS--Continued

SURFACE USES--Continued

faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed.

United States v. Jon Zimmers, Claire Kelly, 81 IBLA 41 (May 17, 1984)

Under the Mining Claims Rights Restoration Act of 1955 it is proper to prohibit all placer mining operations on a mining claim located on land withdrawn for power development or powersite where unrestricted placer mining on such land would result in substantial interference with the use of the land for recreation or other purposes.

The Mining Claims Rights Restoration Act of 1955 gives the Secretary of the Interior no discretion to permit limited or restricted placer mining on land withdrawn or reserved for power development or powersites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may impose on permission to mine is that after placer mining the locator must restore the surface of the claim to its condition immediately prior to mining operations.

United States v. Robert R. Evans, 82 IBLA 155 (July 31, 1984)

TITLE

The Department does not have jurisdiction to consider the relative superiority of the possessory rights of rival mineral claimants to the same ground. A final decision by a court of competent jurisdiction resolves all questions regarding such conflicting rights.

Harvey A. Clifton, 80 IBLA 96 (Apr. 3, 1984)

A perfected but unpatented mining claim is property in the fullest sense of the word, and its ownership, transfer, and use are governed by well-defined code or codes of law, and are recognized by states and the Federal Government.

California Portland Cement Corp., 83 IBLA 11 (Sept. 18, 1984)

TUNNEL SITES

The Act of July 25, 1866, 14 Stat. 242, which granted a right-of-way for construction of a tunnel and a right to purchase lodes within 2,000 feet from the tunnel discovered by constructing the tunnel, did not segregate the surface of the land from mineral location. A Bureau of Land Management decision declaring a lode mining claim located within 2,000 feet of the tunnel right-of-way null and void ab initio will be reversed.

Comstock Tunnel & Drainage Co., Sutro Tunnel Co., 79 IBLA 237 (Mar. 1, 1984)

The Act of July 25, 1866, 14 Stat. 242, which granted a right-of-way for construction of a tunnel and a right to purchase lodes within 2,000 feet from each side of the tunnel discovered by constructing the tunnel, did not segregate the surface of the land from mineral location. A Bureau of Land Management decision declaring a lode mining claim located within 2,000 feet

MINING CLAIMS--Continued

TUNNEL SITES--Continued

of the tunnel right-of-way null and void ab initio will be reversed.

Jack E. Carrington, 81 IBLA 279 (June 12, 1984)

A validly located and maintained tunnel-site claim vests a right in the claimant to subsequently locate a mining claim based upon a discovery by the tunnel-site claimant in the course of driving the tunnel. The date of location of the mining claim so located will relate back to the date of location of the tunnel site.

The Department, which is entrusted with the administration of the public lands, is authorized to determine, for its own purposes, the validity of tunnel-site claims in the same way it determines the validity of lode or placer claims. The Department may make a factual determination that the claimant has or has not located the tunnel-site claim in the manner required by the statute. Since this determination is one of fact, it can be considered in a mining contest, if the issue is properly presented.

The provisions of 30 U.S.C. § 27 (1982) provide that a person who locates a tunnel-site claim must mark the claim from the portal of the tunnel. Therefore, the location of a tunnel-site claim without the prerequisite commencement of a tunnel will not be in compliance with the spirit or intent of the statute, resulting in the claim being void unless and until there is actual commencement of the tunnel. If the facts disclose that a tunnel-site location was made using a portal of an adit not driven for the purpose of establishing the tunnelsite claim, the tunnel site will be considered to be null and void unless there is a showing that this adit had been extended with the intent of using the adit as a part of a tunnel contemplated under the statutory provision.

United States v. Albert F. Parker et al., 82 IBLA 344 (Sept. 12, 1984) 91 I.D. 271

WITHDRAWN LAND

A placer mining claim located for gold on land previously withdrawn from appropriation under the mining laws relating to metalliferous minerals by Public Land Order No. 4522, dated Sept. 13, 1968, is null and void ab initio.

Charles H. Phillips, 78 IBLA 320 (Jan. 24, 1984)

A mining claim located at a time the land is withdrawn from appropriation by the Act of May 29, 1928, is null and void ab initio. It is immaterial whether future revocation of the withdrawal is being considered.

Samuel P. Speerstra, 78 IBLA 343 (Jan. 24, 1984)

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and remanded for appropriate action.

Lamar S. Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

Lands segregated on the public records by a Recreational and Public Purposes lease are not available for the location of mining claims, but a claimant may establish the exterior boundaries of a lode claim on land under a Recreation and Public Purposes lease, with the permission of the lessee, for the purpose of making end lines parallel so as to obtain extralateral rights to a vein or lode discovered on lands available for location.

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Santa Fe Mining, Inc., 79 IBLA 48 (Feb. 9, 1984)

A mining claim whose discovery is located on land segregated and closed to mineral entry by notation of receipt of an application for withdrawal is properly declared null and void ab initio.

Marilyn Dutton Hansen, 79 IBLA 214 (Feb. 28, 1984)

Lloyd J. Mechan, 81 IBLA 239 (June 6, 1984)

The Act of July 25, 1866, 14 Stat. 242, which granted a right-of-way for construction of a tunnel and a right to purchase lodes within 2,000 feet from the tunnel discovered by constructing the tunnel, did not segregate the surface of the land from mineral location. A Bureau of Land Management decision declaring a lode mining claim located within 2,000 feet of the tunnel right-of-way null and void ab initio will be reversed.

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Comstock Tunnel & Drainage Co., Sutro Tunnel Co., 79 IBLA 237 (Mar. 1, 1984)

A locator may not locate a claim with a discovery on patented or withdrawn lands because such lands are not open to the operation of the mining laws. In such cases the claim is void ab initio.

A locator whose discovery is on lands open to location may extend the end lines and side lines of a lode mining claim across patented or withdrawn lands to define extralateral rights to lodes or veins apexing within that portion of the claim subject to location. This principle permits development of unappropriated mineral in irregular parcels of lands in compliance with the statutory requirements for parallel end lines.

Anthony Juskiewicz, 79 IBLA 267 (Mar. 7, 1984)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a power project is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1976), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

J. W. Roberts, Jean Roberts, 79 IBLA 279 (Mar. 16, 1984)

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws, including the mining laws, to the extent specified in the notice.

A placer claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio.

In the absence of specific evidence that a mining claim location notice dated subsequent to the date of withdrawal of the land upon which the claim was located was intended to be an amendment, rather than a relocation, of a claim located prior to the withdrawal, a mining claimant cannot relate the date of a location to an earlier location and thus validate a claim which would otherwise be considered null and void ab initio.

John C. Neill, 80 IBLA 39 (Mar. 28, 1984)

A mining claim located upon lands withdrawn from mineral entry by a Secretarial order for the benefit of the Mission Indians is properly declared null and void ab initio.

Robert E. Dawson, Kenneth E. Dawson, 80 IBLA 99 (Apr. 3, 1984)

Mining claims located on lands that are withdrawn from location are null and void ab initio.

Howard J. Hunt, Howard W. Hunt, 80 IBLA 396 (May 14, 1984)

A mining claim wholly located on land which has been segregated from mineral location by the filing of a state school land indemnity selection application is properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

Mining claims located for trace minerals on land previously withdrawn from mineral entry by Exec. Order No. 5327, as to nonmetalliferous minerals, and Public Land Order No. 4522, as to metalliferous minerals, are properly declared null and void ab initio.

Mineral Life Corp., 81 IBLA 103 (May 30, 1984)

Where lands have been withdrawn from mineral entry, any mining location on such land which is not then supported by a discovery of a valuable mineral deposit must be deemed invalid, even if such a discovery is made at a later date.

United States v. Janet R. Copple et al., 81 IBLA 109 (May 30, 1984)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

The Act of July 25, 1866, 14 Stat. 242, which granted a right-of-way for construction of a tunnel and a right to purchase lodes within 2,000 feet from each side of the tunnel discovered by constructing the tunnel, did not segregate the surface of the land from mineral location. A Bureau of Land Management decision declaring a lode mining claim located within 2,000 feet of the tunnel right-of-way null and void ab initio will be reversed.

Jack E. Carrington, 81 IBLA 279 (June 12, 1984)

Where a lode mining claim is located partially on withdrawn lands, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the withdrawn lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Marvin F. Johnston, 81 IBLA 295 (June 12, 1984)

Mining claims located on land previously withdrawn from mineral entry by a Secretarial order of Dec. 14, 1904, pursuant to sec. 3 of the Act of June 17, 1902, are properly declared null and void ab initio. Therefore, no property rights are created. It is immaterial whether the lands are or have been used for the purpose for which they were withdrawn.

Homer Owens, 81 IBLA 402 (June 29, 1984)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Western Nuclear, Inc., 82 IBLA 67 (July 12, 1984)

MINING CLAIMS RIGHTS RESTORATION ACT

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and remanded for appropriate action.

Lester & Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a power project is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1976), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

J. W. Roberts, Jean Roberts, 79 IBLA 279 (Mar. 16, 1984)

MINING CLAIMS RIGHTS RESTORATION ACT--Continued

Under the Mining Claims Rights Restoration Act of 1955 it is proper to prohibit all placer mining operations on a mining claim located on land withdrawn for power development or powersite where unrestricted placer mining on such land would result in substantial interference with the use of the land for recreation or other purposes.

The Mining Claims Rights Restoration Act of 1955 gives the Secretary of the Interior no discretion to permit limited or restricted placer mining on land withdrawn or reserved for power development or powersites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may impose on permission to mine is that after placer mining the locator must restore the surface of the claim to its condition immediately prior to mining operations.

United States v. Robert R. Evans, 82 IBLA 155 (July 31, 1984)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

GENERALLY

BLM may deviate from provisions contained in an environmental impact statement with respect to regeneration cutting in a planned timber sale where the deviation is not so significant as to require preparation of a supplemental environmental impact statement.

BLM may properly proceed with a proposed timber sale where the environmental assessment of the sale considered all relevant factors, including the impact of road construction on soil erosion, wildlife and recreational resources.

In re Bald Point Timber Sale, 80 IBLA 304 (May 4, 1984)

ENVIRONMENTAL STATEMENTS

Protest to a decision to implement a management and/or control program for black-tailed prairie dogs is properly denied where the decision is based on an environmental assessment which reflects an evaluation of the environmental impacts sufficient to support an informed judgment.

Defenders of Wildlife, 79 IBLA 62 (Feb. 13, 1984)

The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1976), requires preparation of an environmental impact statement whenever a proposed major Federal action will significantly affect the quality of the human environment.

The test for determining the extent to which treatment of a subject in an environmental impact statement for a multistage project may be deferred depends on two factors: (1) whether obtaining more detailed useful information is "meaningfully possible" at the time when the environmental impact statement for an earlier stage is prepared, and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project.

Where a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as a result of information not presently available, and where the Government reserves the power to make such modification or change thereafter, deferment of analysis of that unavailable information does not violate the National Environmental Policy Act.

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

When a proposed action is a critical agency decision which will result in irreversible and irretrievable commitments of resources to an action which will produce a significant impact on the environment, an environmental impact statement is required.

Sierra Club, The Mono Lake Committee, 79 IBLA 240 (Mar. 1, 1984)

Analysis of the environmental impact of a proposed prospecting plan under a hardrock mineral prospecting permit issued pursuant to 16 U.S.C. § 520 (1976), should properly consider the potential cumulative impact of increased vehicular traffic on an access road due to prospecting activity under the permit and related activity on adjacent mining claims.

A finding that a proposed action will not have a significant impact on the environment, and that hence no environmental impact statement is required, will be affirmed on appeal where the record establishes that a hard look has been taken at environmental problems, that relevant areas of environmental concern have been identified, and the determination is the reasonable result of the environmental analysis.

John A. Mejedly, Contra Costa Youth Ass'n, 80 IBLA 14 (Mar. 28, 1984)

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes environmental problems have been considered, relevant areas of environmental concern have been identified, and the determination is reasonable.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)
91 I.D. 165

Where application is made for suspension of unitized oil and gas leases in order to preserve them from expiration pending approval of an application for permission to drill, and where the suspension is granted at the discretion of the authorized officer on condition that permission to drill may be denied upon a finding that drilling operations would result in unacceptable impacts on the wilderness characteristics of the area, an environmental impact statement on the effects of such drilling which fails to consider the alternative of refusing permission to drill is an inadequate basis for a decision to permit drilling.

Sierra Club et al. (On Judicial Remand), 80 IBLA 251 (May 2, 1984)

An agency has a continuing duty to gather and evaluate data pertinent to the environmental impacts of a Federal action after release of an environmental impact statement (EIS) in connection with the action. A supplemental EIS may not be required where some deviation from the action outlined in the EIS is proposed, the change is supported on a rational basis of record, and the adverse impact would be reduced as a result of the change.

In re Thompson Creek Timber Sale, 81 IBLA 242 (June 7, 1984)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

Where an administrative decision is made that a proposed action is not a major Federal action which will significantly affect the quality of the human environment, so that an environmental impact statement need not be filed, that decision will be affirmed on review if it appears to be the reasonable conclusion of a proper and sufficient environmental analysis compiled according to established procedures and it was made by an authorized officer, in good faith, based upon such record.

United States v. Albert O. Husman et al., 81 IBLA 271 (June 8, 1984)

A decision to implement a vegetative management program with herbicide spraying will be reversed where it is based on an environmental assessment which fails to include a "worst case" evaluation of the environmental impacts of the proposed program, and where the record fails to document effects upon the environment of the proposed spraying program.

Save Our ecoSystems, Inc., 81 IBLA 326 (June 19, 1984)

A decision to utilize the herbicide 2,4-D in a vegetation management program will be vacated where it is based on an environmental assessment which lacks a worst case analysis and the record discloses uncertainty as to the effect of the herbicide on the human environment.

Sierra Club, Grand Canyon Chapter, Arizona, 81 IBLA 352 (June 25, 1984)

A decision to utilize herbicides including 2,4-D in a vegetation management program will be vacated where it is based on an environmental assessment which lacks a worst case analysis and the record discloses uncertainty regarding the effect of the herbicides on the human environment.

Although a worst case analysis may be performed in the context of an environmental assessment prepared to supplement a programmatic environmental impact statement, the environmental assessment becomes the functional equivalent of an environmental impact statement and the minimum 45-day comment period for a draft environmental impact statement is applicable.

Applegate Citizens Opposed to Toxic Sprays (ACOTS), Southern Oregon Citizens Against Toxic Sprays (SOCATS), 81 IBLA 398 (June 29, 1984)

Denial of a protest of a determination to proceed with a private exchange will be vacated and the case remanded where the record fails to reflect an evaluation of the environmental impacts sufficient to support an informed judgment.

Where the record shows that missing information is material to an agency decision on a private land exchange, it must be gathered and included in an environmental assessment. Only where the costs of obtaining the information are exorbitant or the means of obtaining it are beyond the state of the art must the agency weigh the need for the action against the risk and severity of possible adverse impacts of proceeding in the face of uncertainty. And only in the case of a determination to proceed in the face of uncertainty must a worst case analysis be conducted in accordance with 40 CFR 1502.22.

National Wildlife Federation, 82 IBLA 303 (Sept. 5, 1984)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

A finding that proposed mining operations will not have a significant impact on the human environment, and that hence no environmental impact statement is required, will be affirmed on appeal where the record establishes that relevant areas of environmental concern have been identified, particularly the effect of excessive stream turbidity due to sediment runoff on fish populations and habitat and local water use, and the determination is the reasonable result of the environmental analysis in light of proposed measures to minimize the environmental impact.

William E. Tucker et al., 82 IBLA 324 (Sept. 7, 1984)

A management plan decision for the Taquina Head Outstanding Natural Area implementing actions to remove various structures and develop a visitors center and to impose restrictions on hang gliding will be affirmed on appeal where the decision is based on an environmental assessment which reflects an evaluation of reasonable alternatives and is sufficient to support an informed judgment. Such a determination may not be overcome by a mere difference of opinion.

Oregon Shores Conservation Coalition, Bruce Waugh, 83 IBLA 1 (Sept. 17, 1984)

NATIONAL PARK SERVICE AREAS

GENERALLY

Bureau of Land Management properly rejects combination prospecting permit/mineral lease applications for lands within the Whiskeytown Unit of the Whiskeytown-Shasta-Trinity National Recreation Area that are not open to mineral leasing under 43 CFR 3566.2-2.

Steve D. Mayberry, Mehrle Jennings, Mark Jennings, 82 IBLA 339 (Sept. 12, 1984)

LAND

Mining

BLM may properly declare lode mining claims located wholly on land within the Lake Mead National Recreation Area, established pursuant to the Act of Oct. 8, 1964, 16 U.S.C. § 460n (1982), null and void ab initio because such land is implicitly withdrawn from mineral entry.

Marvin F. Johnston, 81 IBLA 295 (June 12, 1984)

NAVAL PETROLEUM RESERVES

The conclusion that the Appropriations Act is independent leasing authority is not an implied repeal, ergo tanto, of the Mineral Leasing Act of 1920 because the Naval Petroleum Reserves Production Act of 1976 explicitly precluded the operation of the MLA on the NPR-A, and the Appropriations Act modified that withdrawal only for the purpose of the oil and gas leasing program authorized in the Appropriations Act.

Authorization for Oil and Gas Leasing on the National Petroleum Reserve--Alaska, M-36940 (Oct. 15, 1981)
91 I.D. 1

NAVIGABLE WATERS

Where riparian public land has been completely eroded away by the actions of a navigable river, title is lost to the United States and, where said land is subsequently restored through accretion by the continued action of the river, title belongs to the riparian owner.

David A. Provinse, 81 IBLA 148 (May 31, 1984)

NOTICE

GENERALLY

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

James Neil Fletcher, 78 IBLA 330 (Jan. 24, 1984)

Harriet C. Shaftel, 79 IBLA 228 (Feb. 29, 1984)

When, pursuant to 43 CFR 3112.4-1, BLM sends notice by certified mail to a simultaneous oil and gas applicant at the address of record that the executed lease agreement and rental must be returned to BLM within 30 days of receipt, and the notice is returned to BLM marked "UNCLAIMED" by the Postal Service, and where nondelivery did not occur as a result of negligence of the Postal Service, the applicant is considered to have been served at the time BLM receives the returned, undelivered certified letter, such constructive service being equivalent in legal effect to actual servce of the notice. A tender of the lease agreement by the applicant more than 30 days subsequent to the date of constructive delivery is properly rejected.

Tom Hurd, 80 IBLA 107 (Apr. 3, 1984)

With respect to a known party claiming a property interest adversely affected by a decision to issue conveyance under the Alaska Native Claims Settlement Act, both the regulations at 43 CFR 2650.7 and the requirements of due process mandate an effort to serve notice of the decision, coupled with a 30-day appeal period from date of service. Where such a party files a notice of appeal within 30 days of service of the decision, but not within 30 days of publication of that decision in the Federal Register, it is error for the Bureau of Land Management to dismiss the appeal as untisely.

Goodnews Bay Mining Co. et al., 81 IBLA 1 (May 14, 1984)

"Last address of record." For the purposes of 43 CFR 1810.2(b), in the context of BLM's processing of a lease application, the address stated on the application is to be used as the "last address of record" unless the applicant has filed written notice of a change of address with the BLM office where the application was filed.

When BLM mails a decision to a lease applicant at an address other than the applicant's address of record, BLM cannot attribute constructive notice of the decision to the applicant under the provisions of 43 CFR 1810.2(b).

Victor M. Onet, Jr., 81 IBLA 144 (May 31, 1984)

NOTICE--Continued

GENERALLY--Continued

Where a competitive oil and gas lease isposes additional stipulations without prior notice to the offeror, the offeror may accept or reject the lease containing the additional stipulations. The imposition of additional stipulations without notice to the offeror defers the 15-day period in 43 CFR 3132.5(e) until the offeror has notice of the stipulations to be included in the lease.

Texaco U.S.A. et al., 82 IBLA 61 (July 11, 1984)

Shell Oil Co. et al., 83 IBLA 22 (Sept. 21, 1984)

Where the record in a case establishes that the person authorized by a Native group to act as its agent had actual notice of a certificate of ineligibility for such group, and that the notice of appeal was not transmitted within 30 days of such notice, the notice of appeal must be dismissed. The timely filing of a notice of appeal is jurisdictional, and the Board has no authority to waive a jurisdictional requirement.

Nabesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (Sept. 28, 1984)

CONSTRUCTIVE NOTICE

With respect to a known party claiming a property interest adversely affected by a decision to issue conveyance under the Alaska Native Claims Settlement Act, both the regulations at 43 CFR 2650.7 and the requirements of due process mandate an effort to serve notice of the decision, ccupied with a 30-day appeal period from date of service. Where such a party files l notice of appeal within 30 days of service of the decion, but not within 30 days of publication of that decision in the Federal Register, it is error for the Bureau of Land Management to dismiss the appeal as untisely.

Goodnews Bay Mining Co. et al., 81 IBLA 1 (May 14, 1984)

Where BLM mails a notice to a first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to submit a lease offer and render the first year's rental in accordance with 43 CFR 3112.4-1(a), the applicant will be deemed to have received the notice if it was sent to the applicant's last address of record, regardless of whether it was in fact received by him. However, when a letter is returned to BLM as undeliverable, BLM should examine the case record to see if it contains an updated address. If an updated address would be found upon proper examination, the notice must be sent to the new address to effect service.

Stephen C. Ritchie, 81 IBLA 162 (May 31, 1984)

OIL AND GAS LEASES

GENERALLY

Where a junior offeror challenges the issuance of a lease to a senior offeror on the basis that the senior offer improperly included 320 acres of land not available for noncompetitive leasing and thereby asserts that the lease could have only issued for less than 640 acres of land, the appeal is properly rejected where the record shows that, irrespective of the 320 acres in question, there still remained 640 acres

OIL AND GAS LEASES--Continued

GENERALLY--Continued

of other public land within the lease offer as required by 43 CFR 3110.1-3(a).

John D. LaRue, 78 IBLA 239 (Jan. 10, 1984)

The Secretary of the Interior may require an oil and gas lease offeror to accept stipulations reasonably designed to protect environmental and other land use values as a condition precedent to the issuance of a lease for land located in a national forest. Where on appeal an offeror registers objections concerning such stipulations, and the Forest Service subsequently clarifies the nature of the stipulations and the offeror raises no further complaints, the imposition of the stipulation will be upheld.

James M. Chadnow, Laurent A. Giesbert, 78 IBLA 317 (Jan. 24, 1984)

43 CFR 3112.1-1 provides that all lands which are not within a known geological structure and are covered by a lease which expires by operation of law are subject to leasing only in accordance with 43 CFR Subpart 3112.

Joe W. Johnson, 78 IBLA 382 (Jan. 31, 1984)

A protest to issuance of an oil and gas lease filed after the lease has issued is not timely. Where, however, the "protest" is filed by an individual with subsidiary priority such protest shall be deemed to be an appeal from the rejection of the protestant's application or offer to lease.

Patricia C. Alker, 79 IBLA 123 (Feb. 22, 1984)

Departmental regulation 43 CFR 3105.6 provides that consolidation of leases may be approved if it is determined that there is sufficient justification. Where appellant has not shown that consolidation would be beneficial to the United States and has not offered any evidence to show that BLM abused its discretion in denying the consolidation, the denial of such request will be affirmed.

Conoco, Inc., 80 IBLA 161 (Apr. 11, 1984) 91 I.D. 181

Where application is made for suspension of unitized oil and gas leases in order to preserve them from expiration pending approval of an application for permission to drill, and where the suspension is granted at the discretion of the authorized officer on condition that permission to drill may be denied upon a finding that drilling operations would result in unacceptable impacts on the wilderness characteristics of the area, an environmental impact statement on the effects of such drilling which fails to consider the alternative of refusing permission to drill is an inadequate basis for a decision to permit drilling.

Sierra Club et al. (On Judicial Remand), 80 IBLA 251 (May 2, 1984)

Where BLM's request for additional information may reasonably be interpreted as not subject to a specific time limit, its rejection of an offer for failure by the offeror to submit the requested materials within 30 days must be reversed.

Two Rich Partnership, 82 IBLA 148 (July 30, 1984)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

Departmental regulation 43 CFR 3105.6 (1982) permits consolidation of leases in the interest of conservation. Where, however, some leases sought by appellant to be consolidated were located in a known geologic structure, and some were not, the Bureau of Land Management properly denied consolidation.

Yukasovich Drilling Co., 83 IBLA 9 (Sept. 18, 1984)

ACQUIRED LANDS LEASES

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1976), requires that the consent of the administrative agency having jurisdiction over acquired land described in an oil and gas lease offer be obtained prior to the issuance of a lease for such land. Absent such consent, the Department of the Interior is without authority to issue a lease.

Frederick L. Smith, 78 IBLA 345 (Jan. 25, 1984)

Where an acquired lands oil and gas lease offeror signs an offer form in ink, photocopies exact reproductions of the offer form, including the signature, with the intent that the photocopied signature be his signature, and submits the documents as the offer, that offer fulfills the signature requirement of 43 CFR 3111.1-2(a) (1981), and it is improper to reject that offer because the photocopies were not personally signed.

Where a noncompetitive acquired lands oil and gas lease offeror submits one original lease offer form together with six copies of the front of the original form and six copies of the back of the form, the offeror has failed to comply with 43 CFR 3111.1-2(a) (1981), which specifies that each copy must be an exact reproduction of one page of both sides of the official approved one-page form. However, failure to submit properly reproduced copies of the form is a curable defect under 43 CFR 3111.1-1(e)(4) (1981).

James L. Casblos III, Christine C. Casblos, 78 IBLA 369 (Jan. 30, 1984)

Where oil and gas deposits in lands acquired by the United States and devoted to use for military purposes become "surplus property" under the Federal Property and Administrative Services Act, such deposits may be leased only under the provisions of that Act, and are not subject to leasing under the Mineral Leasing Act for Acquired Lands.

Gerald A. Waters, 78 IBLA 387 (Jan. 31, 1984)

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1976), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease. Where an offeror seeks to lease lands under the jurisdiction of the Department of the Navy, and that Department refuses consent, no lease may issue.

Union Oil Co. of California, Stephen E. Bubala, 79 IBLA 86 (Feb. 16, 1984)

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

Where 43 CFR 3101.2-3(b)(3) (1982) allowed the use of the acquisition tract number assigned by the acquiring agency to identify land sought to be leased, an acquired lands oil and gas lease offer using numbers assigned by the acquiring agency and accompanied by a map on which the location of individual tracts within the administrative unit is clearly marked and labeled is acceptable.

Leon E. Scully, Jr., Paul D. Reaird, 79 IBLA 117 (Feb. 22, 1984)

BLM may, in its discretion, decline to issue an oil and gas lease, pursuant to an over-the-counter offer, where its records do not clearly show that the title to the oil and gas is in the United States. Prior to such action, however, BLM should afford the offeror an opportunity to show that the United States does, in fact, own title to the oil and gas interests in the lands sought to be leased.

Russell H. Green, Jr., 81 IBLA 201 (June 1, 1984)

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer for acquired military lands which were subject to a Secretarial moratorium on noncompetitive oil and gas leasing at the time that the offer was filed, even where the Secretary has thereafter rescinded the moratorium, but has provided that the land will be leased under the simultaneous oil and gas leasing system.

Barrick Exploration Co., 82 IBLA 172 (Aug. 7, 1984)

ACREAGE LIMITATIONS

Under 30 U.S.C. § 184(d) (1982), no person, association, or corporation shall take, hold, own, or control at one time oil and gas leases or interests therein on land exceeding 246,080 acres in any one State other than Alaska. Under 43 CFR 3101.1-5 (1981), acreage applications and offers for oil and gas leases were included in calculating the total holdings. If an offeror filed a group of applications, any one of which caused him to exceed the acreage limitations, the entire group were required to be rejected pursuant to 43 CFR 3101.1-5(c)(3)(ii) (1981).

Exceeding the maximum acreage limit when filing an offer to lease was not a minor defect which was subject to cure.

Irvin Wall (On Reconsideration), 80 IBLA 339 (May 10, 1984)

APPLICATIONS

Generally

A junior over-the-counter noncompetitive oil and gas lease offer is properly rejected where the lands have been leased to a senior offeror and the junior offeror fails to provide valid reasons why the senior offer should be considered defective.

John D. Lange, 78 IBLA 239 (Jan. 10, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

An oil and gas lease offer is properly rejected under provisions of 43 CFR 3111.1-1(a) where the offeror signs only two copies of five submitted lease offer forms.

Glen R. Cassaring, 78 IBLA 242 (Jan. 10, 1984) 91 I.D. 9

An offeror for a Federal oil and gas lease has no rights in the land or its minerals until the lease is issued to it. The Secretary of the Interior is not required to, but "may," issue a lease for any given tract. Therefore, BLM can properly reject a noncompetitive lease offer where the lands are included in a favorable petroleum geological province, which is leaseable only through competitive bidding pursuant to the Mineral Leasing Act of 1920, as sodified by the Alaska Naticnal Interest Lands Conservation Act.

E. B. Joiner, 78 IBLA 323 (Jan. 24, 1984)

An oil and gas lease offer is properly rejected where the offer is deficient in the first year's rental by more than 10 percent.

Pursuant to 43 CFR 3130.2-1, rentals are not properly prorated for any lands in which the United States owns an undivided fractional interest, but shall be payable at the same rate as provided for the full acreage in such lands.

A noncompetitive oil and gas lease offer filed "over-the-counter" is properly rejected when the accompanying rental payment is deficient by more than 10 percent. However, in appropriate circumstances, if the balance of the rental is paid prior to rejection by BLM and there are no intervening rights of third parties, the offer may be reinstated with priority from the date the deficiency is corrected.

Joe W. Johnson, 78 IBLA 382 (Jan. 31, 1984)

Under 43 CFR 3112.2-2(c) (1982), BLM properly disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition of further participation in the simultaneous leasing program.

Marceann Killian, 79 IBLA 105 (Feb. 17, 1984)

NFL Partnership, Main Street Federal Energy Co., 82 IBLA 75 (July 17, 1984)

The filing of an appeal from rejection of a lease offer or application preserves the viability of the offer or application during the pendency of the appeal. Thus, if it can be shown that the lease improperly issued to another party, the lease is properly canceled and may be awarded to the appellant.

Where the lessee of an oil and gas lease fails to pay the annual rental, the lease is terminated. Such termination, however, does not moot an unadjudicated appeal challenging the issuance of the lease to the lessee. Appellant is entitled to an adjudication of her appeal. Upon a determination that the terminated lease was improperly issued to the lessee in the first instance, appellant as the first-qualified applicant may be awarded the lease.

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of an agreement between the lessee as

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

priority applicant and her assignee which would have resulted in a violation of 43 CFR 3102.2-6(a) and (b), the lessee is the party with peculiar means and knowledge enabling her to show the nonexistence of such agreement. Failure or refusal to do so may give rise to an inference that the lessee's evidence is unfavorable.

Patricia C. Alter, 79 IBLA 123 (Feb. 22, 1984)

An oil and gas lease offer filed for lands embraced in a senior offer is properly rejected when a lease issues in response to the senior offer.

Glen W. Cassaring, 79 IBLA 138 (Feb. 22, 1984)

"Prevents automated processing." As used in 43 CFR 3112.3(a)(2), 49 FR 2113 (Jan. 18, 1984), an application form is prepared in a manner that "prevents automated processing" where a mistake or omission prevents the computer from fully completing the automated program. An application containing such a deficiency is properly held to be "unacceptable."

Where an application form is deemed unacceptable under the automated simultaneous oil and gas leasing system, all filing fees submitted with such form are returned, after assessment of a $75 processing fee, even if the deficiency which rendered the form unacceptable is not discovered until after selection of successful applications.

An application is properly rejected where the applicant has failed to disclose all parties in interest, has failed to identify any party who gave assistance in preparing the application, has interests in another filing for the same parcel, has failed to disclose all individuals in an association or partnership which has filed an application, or has utilized the address of a person or entity in the business of providing assistance for the filing of applications. An application is also properly rejected where the application is signed by a person other than the applicant and the signatory has failed to disclose the relationship between them. Where an application is properly rejected, the Department lacks authority to authorize the refund of any filing fees tendered with the application.

Where a deficiency on an application form filed in the automated simultaneous leasing program neither prevents automated processing nor involves a failure to provide information necessary to police the system to prevent fraud or abuse, such deficiency shall be deemed de minimis, and will not render the application either unacceptable or rejectable.

Rejection of an application to lease filed under the automated simultaneous system necessarily encompasses retention of filing fees submitted therewith. Where an application to lease is "rejected" because of a deficiency on the application form, an applicant must either appeal or seek a return of any filing fees within 30 days of rejection. Where an applicant fails to do either, he will be barred from subsequently seeking a return of filing fees on the grounds that the deficiency should properly have been treated as rendering the application "unacceptable."

Shaw Resources, Inc., 79 IBLA 153 (Feb. 24, 1984)
91 I.D. 122

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Under 30 U.S.C. § 226(b) (Supp. V 1981), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geological structure of a producing oil or gas field has the burden of showing that the determination is in error. Absent any argument of fact or evidence suggesting such error, the determination will be upheld.

Stephen E. Haglund, 79 IBLA 252 (Mar. 5, 1984)

The regulatory requirement that a simultaneously filed oil and gas lease application be rendered in a manner that reveals the name of the applicant, the name of the signatory, and their relationship is not satisfied where no indication of the signatory's authority appears on the application and there is no reference to a qualifications file where the relationship between the signatory and the applicant is disclosed.

U.S. Oil Co., Inc., 80 IBLA 10 (Mar. 27, 1984)

Tipperary Oil & Gas Corp., 81 IBLA 91 (May 24, 1984)

An offer submitted by a partner for the first-drawn applicant under the simultaneous filing program which is not rendered in such a manner as to reveal the name of the potential lessee, the name of the signatory, and their relationship, is properly rejected.

Corinth Partnership, 80 IBLA 31 (Mar. 28, 1984)

The regulatory requirement that a simultaneously filed oil and gas lease application be rendered in a manner that reveals the name of the applicant, the name of the signatory, and their relationship is not satisfied where no indication of the signatory's authority appears on the application and there is no reference to a statement of qualifications on file with BLM in which the relationship between the signatory and the applicant is disclosed.

BLM is not required under 43 CFR 3102.5 to gather substantive information required on but missing from a simultaneously filed oil and gas lease application.

Chickasaw Oil & Gas, Inc., 80 IBLA 60 (Mar. 29, 1984)

A known geologic structure is a trap, either structural or stratigraphic in nature, in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, and which includes all acreage that is presumptively productive.

Land within a known geologic structure of a producing oil or gas field may only be leased after competitive bidding.

An applicant for a noncompetitive acquired lands oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Reed International, 80 IBLA 145 (Apr. 6, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

When an oil and gas lease applicant files Forms 3112-6 and 3112-6a which contain mismatched social security numbers, the application is rendered "unacceptable," regardless of when the error was discovered. Such an application is unacceptable at the time of filing and the subsequent erroneous inclusion in the selection process does not render the application "rejectable."

An applicant cannot receive any priority based on an application deemed to be unacceptable, even though the application is included in the selection process and selected with priority.

Howell Roberts Spear, 80 IBLA 150 (Apr. 6, 1984)

Where, in a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit his first year's advance rental payment within 30 days after receipt of notice, as prescribed by 43 CFR 3112.4-1(a) (1982), his lease offer must be rejected.

S. B. Partners, 80 IBLA 153 (Apr. 9, 1984)

Where an applicant for a simultaneous oil and gas lease submits a folded automated application, such application is properly deemed unacceptable under 43 CFR 3112.3(a) (48 FR 33679 (July 22, 1983)), and the applicant is entitled to a refund of filing fees after assessment of a $75 processing fee.

Frances Kunkel, 80 IBLA 333 (May 8, 1984)

Where a subdivision which is available for oil and gas leasing in one township would normally be adjacent to land similarly available in another township, a holding that a lease offer for one such subdivision which does not include the other is violative of the "640-acre rule" will be vacated upon a showing that the two townships are offset and the subdivisions concerned are not actually adjacent.

Under 30 U.S.C. § 184(d) (1982), no person, association, or corporation shall take, hold, own, or control at one time oil and gas leases or interests therein on land exceeding 246,080 acres in any one State other than Alaska. Under 43 CFR 3101.1-5 (1981), acreage applications and offers for oil and gas leases were included in calculating the total holdings. If an offeror filed a group of applications, any one of which caused him to exceed the acreage limitations, the entire group were required to be rejected pursuant to 43 CFR 3101.1-5(c)(3)(ii) (1981).

Exceeding the maximum acreage limit when filing an offer to lease was not a minor defect which was subject to cure.

Irvin Wall (On Reconsideration), 80 IBLA 339 (May 10, 1984)

Where an application form is unacceptable under the automated simultaneous oil and gas leasing system, all filing fees submitted with such form are returned, after assessment of a $75 processing fee per application form, even if the deficiency which rendered the form unacceptable is not discovered until after selection of successful applications.

Casey D. McDaniel, 80 IBLA 393 (May 14, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

A mismatched Part A and Part B in the automated simultaneous oil and gas leasing system renders an application unacceptable under the regulations because the computer is prevented from fully completing the automated program.

Where an application form is deemed unacceptable under the automated simultaneous oil and gas leasing system, all filing fees submitted with such form are returned after assessment of a $75 processing fee, even if the deficiency which renders the form unacceptable is not discovered until after selection of successful applications.

Harold Eugene Turner, 81 IBLA 106 (May 30, 1984)

The filing of an appeal from rejection of a lease offer or application preserves the viability of the offer or application during the pendency of the appeal. Thus, where it is shown that the lease improperly issued to another party, the lease is properly canceled and may be awarded to the appellant.

Judy Fleming, 81 IBLA 290 (June 12, 1984)

Where, in a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit his executed lease agreement and first year's advance rental payment within 30 days after receipt of notice to do so, as prescribed by 43 CFR 3112.6-1(a), his lease application must be rejected.

Fred William Berger, 81 IBLA 344 (June 25, 1984)

BLM has no authority under the Mineral Leasing Act as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 226(b) (1982), to issue a noncompetitive oil and gas lease for land within a designated tar sand area. A noncompetitive lease improvidently issued after the enactment of the amendment in violation of its requirements is properly canceled upon discovery of the error.

Dorothy Langley, 81 IBLA 349 (June 25, 1984)

If an oil and gas lease is to be issued for a particular tract, it must be issued to the first-qualified applicant. An application filed pursuant to the simultaneous filing procedure and selected with first priority is a noncompetitive application to lease for oil and gas and does not create a property right in the applicant but is merely a hope or expectation. The Secretary of the Interior may, in his discretion, reject any application to lease for oil and gas. An application, however, may not be rejected on a basis other than that permitted by law.

The first-qualified applicant for an oil and gas lease acquires no vested right to have a lease issued to him but only a right to be preferred over other applicants if a lease is to be issued and his application may be rejected if it is determined that a previously terminated lease including the lands sought for leasing should be reinstated under sec. 401 of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2447, which amended sec. 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982).

Nola Grace Pfaynshi, 82 IBLA 48 (July 11, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Where a simultaneously filed oil and gas lease application is executed in a manner which incorporates numerous errors and violates several regulations, and thus creates ambiguities which cannot be resolved without the subsequent submission of further information, the application should be rejected. The fact that certain of these errors or violations have been held to be trivial or nonsubstantive when considered individually in other cases cannot serve to mitigate the cumulative effect of all of them appearing in a single application.

Maurice W. Coburn (On Reconsideration), 82 IBLA 112 (July 24, 1984)

Where BLM's request for additional information may reasonably be interpreted as not subject to a specific time limit, its rejection of an offer for failure by the offeror to submit the requested materials within 30 days must be reversed.

Two Rich Partnership, 82 IBLA 148 (July 30, 1984)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

Lloyd Chemical Sales, Inc., 82 IBLA 182 (Aug. 13, 1984)

Regulations should be so clear that there is no basis for an oil and gas lessee's noncompliance with them, or they should not be interpreted to deprive him of his lease.

James M. Chudnow, 82 IBLA 262 (Aug. 29, 1984)

Amendments

BLM must reject a noncompetitive over-the-counter oil and gas lease offer filed pursuant to sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976), to the extent that the land has been patented with no mineral reservation to the United States and in its entirety where the land cannot be embraced within a 6-mile square area or an area not exceeding six surveyed sections in length and width and the first year's advance rental is deficient by more than 10 percent.

Prior to its rejection, a deficient over-the-counter oil and gas lease offer may be cured by the offeror's submission of corrective information to BLM in order to obtain priority as of the date of filing that data, however, a proposed amendment changing the land description submitted after rejection of the lease offer constitutes a new offer requiring the filing of a new lease offer.

James M. Chudnow, John L. Messinger, 79 IBLA 1 (Feb. 2, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Amendments--Continued

In Lowry v. Watt, 684 F.2d 957 (D.C. Cir. 1982), and Coyer v. Watt, 720 F.2d 626 (10th Cir. 1984), the amendment and disclaimer of Fred L. Engle, d.b.a. Resource Service Co. was held to be effective to waive the exclusive agency provision that formed part of the company's contract with its clients. The waiver being effective, neither the company nor Engle possessed an interest in a client's offer at the time of a drawing of simultaneously filed oil and gas lease offers so as to invalidate the offer.

Michigan Wisconsin Pipeline Co. (On Reconsideration), Geosearch, Inc., John A. Kocherjen, 80 IBLA 317 (May 7, 1984)

Attorneys-in-Fact or Agents

Under 43 CFR 3102.2-1 (1981), a simultaneous oil and gas lease applicant could have filed for reference the statement of qualifications of the agent required by 43 CFR 3102.2-6 (1981) in any Bureau of Land Management state office. Upon acceptance of the filing by BLM and assignment of a serial number, the applicant could have properly referenced the serial number on future oil and gas applications filed with any BLM office in lieu of resubmitting the statement.

The Board will set aside a BLM decision denying a protest contending that the first-drawn applicant for a noncompetitive oil and gas lease has not complied with 43 CFR 3102.2-6 (1981), requiring the disclosure of any agreement or arrangement with the lease filing service which assisted the applicant and order a hearing, where on appeal the protestant creates considerable doubt that the applicant provided all relevant information.

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of materials defining the relationship between the priority applicant and its filing service, the applicant, as the party with peculiar means of knowledge enabling it to prove the nonexistence of such materials, has the burden of doing so. Failure to do so may give rise to an inference that the applicant's evidence is unfavorable.

An agency agreement which was filed for reference pursuant to 43 CFR 3102.2-1(c) (1981), had to be limited in duration to less than 2 years.

Hal Carlson, Jr., 78 IBLA 333 (Jan. 24, 1984)

Pursuant to 43 CFR 3112.4-1(b) (1982) the power of attorney authorizing an attorney-in-fact to sign lease offers submitted under the simultaneous filing procedures must preclude the attorney-in-fact from filing offers on behalf of any other offeror.

Amy Polak, F. R. Polak, 79 IBLA 191 (Mar. 27, 1984)

An offer submitted by a partner for the first-drawn applicant under the simultaneous filing program which is not rendered in such a manner as to reveal the name of the potential lessee, the name of the signatory, and their relationship, is properly rejected.

Corinth Partnership, 80 IBLA 31 (Mar. 28, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Attorneys-in-Fact or Agents--Continued

A simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship. Where there is no indication on the application of the signatory's relationship to the applicant, or any reference to a qualifications file that indicates the relationship, the requirements of 43 CFR 3112.2-1(h) have not been satisfied and the application is properly rejected.

Martin, Williams & Judson, 80 IBLA 143 (Apr. 6, 1984)

A simultaneous oil and gas lease application submitted by an agent for an applicant which is not rendered in a manner to reveal the name of the potential lessee, the name of the signatory, and their relationship, is properly rejected.

Where BLM makes an inquiry because of an apparent discrepancy between a simultaneous oil and gas lease application and the corresponding lease offer, and applicant provides information that establishes the existence of a regulatory violation, the application is properly rejected. Such information does not cure a deficiency; it proves a violation.

Jonas P. Beachy, 80 IBLA 209 (Apr. 26, 1984)

Description

BLM must reject a noncompetitive over-the-counter oil and gas lease offer filed pursuant to sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976), to the extent that the land has been patented with no mineral reservation to the United States and in its entirety where the land cannot be embraced within a 6-mile square area or an area not exceeding six surveyed sections in length and width and the first year's advance rental is deficient by more than 10 percent.

James M. Chudnow, John L. Messinger, 79 IBLA 1 (Feb. 2, 1984)

An oil and gas lease offer for surveyed public lands is properly rejected where it describes the requested land by metes and bounds rather than by legal subdivision or aliquot parts thereof, section, township, and range.

Helen G. Haggard, 79 IBLA 320 (Mar. 21, 1984)

Where an oil and gas lease offer for unsurveyed, acquired lands in the Monongahela National Forest is protested on the basis that the metes and bounds description of the lands sought fails to close, and the protest is dismissed because even though the description does not close, the offer is accompanied by a map clearly showing the desired lands, such dismissal is improper. Notwithstanding the inclusion of the map, a description that fails to close is a defective description which does not entitle the offeror to the award of a lease thereto.

Amoco Production Co., 81 IBLA 323 (June 19, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Description--Continued

A description in an over-the-counter offer for the SE 1/4 SE 1/4 sec. 9, T. 3 N., R. 32 W., fifth principal meridian, less and except a 5-acre parcel that the applicant describes by a metes and bounds description tied to the nearest existing survey corner is sufficient to satisfy the regulation governing land descriptions of surveyed public domain.

Tim R. Smith, 81 IBLA 337 (June 21, 1984)

A noncompetitive acquired lands oil and gas lease offer for lands not surveyed under the rectangular system for public land surveys is properly rejected where the offeror fails to include a map, where land is included in the description which is not owned by the United States, or where the land description is inadequate.

James M. Chudnow, 82 IBLA 95 (July 19, 1984)

Drawings

Failure of an applicant to date a simultaneous oil and gas lease application in accordance with 43 CFR 3112.2-1(c) (1982) does not require rejection of the application.

Billie L. Enrick, 78 IBLA 358 (Jan. 27, 1984)

Marvey Howard Trott, 79 IBLA 146 (Feb. 23, 1984)

Where a simultaneous oil and gas lease application bears a date earlier than the commencement of the filing period, but was dated and signed during the filing period, and it is established that the misdating was merely inadvertent and not done with an intent to obtain a lease by fraud, the misdating is a nonsubstantive error which does not require the rejection of the application.

Richard W. Berwick (On Reconsideration), 78 IBLA 360 (Jan. 27, 1984)

Where a simultaneous oil and gas lease application is dated prior to the commencement of the filing period and it is established that such misdating was merely inadvertent and not done with an intent to obtain a lease by fraud and that the application was signed during the filing period, the misdating is a nonsubstantive error which does not require the rejection of the application.

Walter W. Hush, Sr., 78 IBLA 363 (Jan. 30, 1984)

43 CFR 3112.1-1 provides that all lands which are not within a known geological structure and are covered by a lease which expires by operation of law are subject to leasing only in accordance with 43 CFR Subpart 3112.

Joe M. Johnson, 78 IBLA 382 (Jan. 31, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

An automated simultaneous oil and gas lease application Part B, Form 3112-6a, which does not reflect in the space designated "MARK SOCIAL SECURITY NUMBER" the same identification number used on the corresponding Part A, Form 3112-6, is not properly completed and must be deemed unacceptable.

Joan Chorney, 79 IBLA 271 (Mar. 12, 1984)

Stella J. Redrath, 80 IBLA 174 (Apr. 13, 1984)

Under 43 CFR 3112.2-1(b), a simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship. Where there is no reference on the application to the signatory's relationship to the applicant, nor any reference to a qualifications file where the necessary information might be found, the requirements of the regulation have not been satisfied.

Pamela Ann Kimple, 79 IBLA 276 (Mar. 13, 1984)

Where an automated simultaneous oil and gas lease application Part B, Form 3112-6a, does not contain a correct identification number in the circles under the space designated "MARK SOCIAL SECURITY NUMBER," it is not properly completed and is therefore unacceptable.

Newman Partnership, 79 IBLA 281 (Mar. 20, 1984)

An applicant receiving priority in a drawing of simultaneously filed oil and gas lease applications who fails to submit the payment of the proper amount of advance rental within 30 days after receipt of a notice that payment is due, as prescribed by 43 CFR 3112.4-1(a), is automatically disqualified to receive a lease.

B. W. Jones, 79 IBLA 295 (Mar. 20, 1984)

Pursuant to 43 CFR 3112.4-1(b) (1982) the power of attorney authorizing an attorney-in-fact to sign lease offers submitted under the simultaneous filing procedures must preclude the attorney-in-fact from filing offers on behalf of any other offeror.

Ann Polak, P. R. Polak, 79 IBLA 391 (Mar. 27, 1984)

The regulatory requirement that a simultaneously filed oil and gas lease application be rendered in a manner that reveals the name of the applicant, the name of the signatory, and their relationship is not satisfied where no indication of the signatory's authority appears on the application and there is no reference to a qualifications file where the relationship between the signatory and the applicant is disclosed.

U.S. Oil Corp., Inc., 80 IBLA 10 (Mar. 27, 1984)

Tipperary Oil & Gas Corp., 81 IBLA 91 (May 24, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

An offer submitted by a partner for the first-drawn applicant under the simultaneous filing program which is not rendered in such a manner as to reveal the name of the potential lessee, the name of the signatory, and their relationship, is properly rejected.

Corinth Partnership, 80 IBLA 31 (Mar. 28, 1984)

The regulatory requirement that a simultaneously filed oil and gas lease application be rendered in a manner that reveals the name of the applicant, the name of the signatory, and their relationship is not satisfied where no indication of the signatory's authority appears on the application and there is no reference to a statement of qualifications on file with BLM in which the relationship between the signatory and the applicant is disclosed.

BLM is not required under 43 CFR 3102.5 to gather substantive information required on but not part of a simultaneously filed oil and gas lease application.

Chickasaw Oil & Gas, Inc., 80 IBLA 60 (Mar. 29, 1984)

Where an automated simultaneous oil and gas lease application Part B (Form 3112-6a) bears a different identification number in the space designated "MARK SOCIAL SECURITY NUMBER" than the identification number entered on Part A (Form 3112-6), the lease application is not properly completed and must be deemed unacceptable.

Thomas Connell, 80 IBLA 135 (Apr. 6, 1984)

Marvin A. Urquhart, Jr., 81 IBLA 370 (June 28, 1984)

A simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship. Where there is no indication on the application of the signatory's relationship to the applicant, or any reference to a qualifications file that indicates the relationship, the requirements of 43 CFR 3112.2-1(b) have not been satisfied and the application is properly rejected.

Martin, Williams & Judson, 80 IBLA 143 (Apr. 6, 1984)

Where an automated simultaneous oil and gas lease application Part A, Form 3112-6, is either not on file at the time of the drawing or on file and contains a defect (more than one circle darkened per column) which prevents the computer from fully completing the automated processing of the application, the application is properly deemed to be unacceptable.

James R. Taylor, 80 IBLA 157 (Apr. 10, 1984)

Under 43 CFR 3112.2-2 (1982), BLM properly disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition for further participation in the simultaneous leasing program even where an applicant substitutes a collectible remittance after the filing period but prior to the simultaneous oil and gas lease drawing.

Charles R. Brucks, Jr., 80 IBLA 190 (Apr. 20, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

Where, following the drawing of a simultaneously filed oil and gas lease drawing entry card, a priority applicant fails to submit advance rental within 10 days from the date of receipt of notice that payment is due, disqualification of the offer is automatic.

Judith A. Lawton, 80 IBLA 198 (Apr. 24, 1984)

A simultaneous oil and gas lease application submitted by an agent for an applicant which is not rendered in a manner to reveal the name of the potential lessee, the name of the signatory, and their relationship, is properly rejected.

Where BLM makes an inquiry because of an apparent discrepancy between a simultaneous oil and gas lease application and the corresponding lease offer, and applicant provides information that establishes the existence of a regulatory violation, the application is properly rejected. Such information does not cure a deficiency; it proves a violation.

Jonas P. Beachy, 80 IBLA 209 (Apr. 26, 1984)

Where a simultaneous oil and gas lease application bears a date subsequent to the close of the filing period, but the evidence discloses that the application was dated, signed, and submitted to BLM during the filing period, and it is established that the misdating was merely inadvertent and not done with an intent to obtain a lease by fraud, the misdating is a nonsubstantive error which does not require the rejection of the application.

Billy W. Eddy, 80 IBLA 213 (Apr. 26, 1984)

A simultaneous oil and gas lease application was not properly completed in accordance with 43 CFR 3112.2-1(g) (1982), where the identification numbers on Parts A and B of the application do not match. Such an error renders the application unacceptable, regardless of whether it was discovered before or after the drawing. The applicant is entitled to a return of his filing fees, minus a $75 processing fee, and the Board will remand the case to the Bureau of Land Management for that purpose.

Fillman W. Jackson, 80 IBLA 225 (Apr. 30, 1984)

Under 43 CFR 3112.2-2 (1982), it is proper for BLM to disqualify simultaneous oil and gas lease applications submitted with uncollectible filing fees and require payment of the debt as a condition for further participation in the simultaneous leasing program, even where an applicant substitutes a collectible remittance after the filing period.

Satish K. Arora, 80 IBLA 271 (May 4, 1984)

In Lowery v. Watt, 684 F.2d 957 (D.C. Cir. 1982), and Cover v. Watt, 720 F.2d 626 (10th Cir. 1983), the amendment and disclaimer of Fred L. Engle, d.b.a. Wasgaros Service Co, was held to be effective to waive the exclusive agency provision that formed part of the company's contract with its clients. The waiver being effective, neither the company nor Engle possessed an interest in a client's offer at the time of a drawing

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

of simultaneously filed oil and gas lease offers so as to invalidate the offer.

Michigan Wisconsin Pipeline Co. (On Reconsideration), Geosearch, Inc., John A. Kocbergen, 80 IBLA 317 (May 7, 1984)

An automated simultaneous oil and gas lease application Part B, Form 3112-6a, which is unsigned is not properly completed and must be found to be unacceptable.

Carey D. McDaniel, 80 IBLA 393 (May 14, 1984)

Where an automated simultaneous oil and gas lease application Part B, Form 3112-6a, does not contain a correct identification number in the space designated "MARK SOCIAL SECURITY NUMBER," which is the same number used in the corresponding Part A, Form 3112-6, it is not properly completed and is therefore unacceptable.

David Earl Frye, 81 IBLA 49 (May 18, 1984)

Where an oil and gas lease offeror properly receives notice of his priority, and notice of the requirements that the rental payment must be paid and that the lease must be executed within 30 days, the failure to make the rental payment and execute the lease within the 30-day period will result in rejection of the application. The offeror's absence from his address of record when the notice was received at his address will not excuse noncompliance with 43 CFR 3112.6-1.

Flonne Ervin, 81 IBLA 100 (May 29, 1984)

A mismatched Part A and Part B in the automated simultaneous oil and gas leasing system renders an application unacceptable under the regulations because the computer is prevented from fully completing the automated program.

Harold Eugene Turner, 81 IBLA 106 (May 30, 1984)

Where the identification number on an automated simultaneous oil and gas lease application form Part B differs from that on Part A, the application is unacceptable, and appellant is entitled to a refund of her filing fees paid in excess of $75 per application form as a result.

Mary Mae Spear, 81 IBLA 220 (June 6, 1984)

BLM may properly reject a simultaneous oil and gas lease application which is not signed within the appropriate filing period in accordance with 43 CFR 3112.2-1(c) (1982).

Thomas M. Gwyn, 82 IBLA 11 (July 5, 1984)

Where a simultaneously filed oil and gas lease application is executed in a manner which incorporates numerous errors and violates several regulations, and thus creates ambiguities which cannot be resolved without the subsequent submission of further information, the application should be rejected. The fact that certain of these errors or violations have been held

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

to be trivial or nonsubstantive when considered individually in other cases cannot serve to mitigate the cumulative effect of all of them appearing in a single application.

Maurice W. Cohnen (On Reconsideration), 82 IBLA 112 (July 24, 1984)

BLM may not properly reject a simultaneous oil and gas lease application where the application is signed on behalf of the applicant and the signature includes the title of the applicant as "partner" of a particular partnership, designated as another party in interest, since it is possible to determine the identity of the applicant and the word referring to title should have been treated as surplusage.

Ann M. Davis et al., 82 IBLA 151 (July 30, 1984)

Failure of a first-drawn simultaneous oil and gas lease application to reveal the relationship between the person signing the application and the corporate applicant, contrary to provision of 43 CFR 3112.2-1(b), does not constitute a substantial defect so as to prevent lease issuance, where a reviewing United States District Court finds that the Bureau of Land Management employees concerned have actual knowledge of the relationship.

ANR Production Co., 82 IBLA 228 (Aug. 23, 1984)

Where the identification number on an automated simultaneous oil and gas lease application form Part B differs from that on Part A, the application is unacceptable.

Nancy Spencer, 82 IBLA 245 (Aug. 28, 1984)

Where Part A of an automated Simultaneous oil and gas lease application is not submitted with Part B and is not on file at the time of receipt of Part B, i.e., by the end of the filing period for applications, BLM may properly declare the lease application to be unacceptable, even where it was erroneously included in the lease drawing.

M. W. Casavranda, 83 IBLA 25 (Sept. 21, 1984)

Where, after a drawing of simultaneously filed oil and gas lease applications, the authorized officer mails a notice to the successful drawee informing him of his priority and the requirement that the advance rental must be paid within the allotted time, which letter is received at his address of record, his subsequent failure to remit the rental timely will disqualify his application even though he asserts that the person who received and signed for the notice was not his designated agent for receipt of mail.

After a drawing of simultaneously filed oil and gas lease applications the requirement that the first year's rental be received in the proper office within the allotted time after notice to the applicant is mandatory, and consideration of excuses for failure to comply is not permitted.

Daniel Pia, 83 IBLA 47 (Sept. 24, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing

An oil and gas lease offer is properly rejected under provision of 43 CFR 3111.1-1(a) where the offeror signs only two copies of five submitted lease offer forms.

Glen R. Cassaday, 78 IBLA 242 (Jan. 10, 1984)
91 I.D. 9

Under 43 CFR 3102.2-1 (1981), a simultaneous oil and gas lease applicant could have filed for reference the statement of qualifications of his agent required by 43 CFR 3102.2-6 (1981) in any Bureau of Land Management state office. Upon acceptance of the filing by BLM and assignment of a serial number, the applicant could have properly referenced the serial number on future oil and gas applications filed with any BLM office in lieu of resubmitting the statement.

The Board will set aside a BLM decision denying a protest contending that the first-drawn applicant for a noncompetitive oil and gas lease has not complied with 43 CFR 3102.2-6 (1981), requiring the disclosure of any agreement or arrangement with the lease filing service which assisted the applicant and order a hearing, where on appeal the protestant creates considerable doubt that the applicant provided all relevant information.

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of materials defining the relationship between the priority applicant and its filing service, the applicant, as the party with peculiar means of knowledge enabling it to prove the nonexistence of such materials, has the burden of doing so. Failure to do so may give rise to an inference that the applicant's evidence is unfavorable.

An agency agreement which was filed for reference pursuant to 43 CFR 3102.2-1(c) (1981), had to be limited in duration to less than 2 years.

Hal Carlson, Jr., 78 IBLA 333 (Jan. 24, 1984)

Where a simultaneous oil and gas lease application bears a date earlier than the commencement of the filing period, but was dated and signed during the filing period, and it is established that the misdating was merely inadvertent and not done with an intent to obtain a lease by fraud, the misdating is a nonsubstantive error which does not require the rejection of the application.

Richard W. Renwick (On Reconsideration), 78 IBLA 363 (Jan. 27, 1984)

Where a simultaneous oil and gas lease application is dated prior to the commencement of the filing period and it is established that such misdating was merely inadvertent and not done with an intent to obtain a lease by fraud and that the application was signed during the filing period, the misdating is a nonsubstantive error which does not require the rejection of the application.

Walter W. Bush, Sr., 78 IBLA 363 (Jan. 30, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

Where an acquired lands oil and gas lease offeror signs an offer form in ink, photocopies exact reproductions of the offer form, including the signature, with the intent that the photocopied signature be his signature, and submits the documents as the offer, that offer fulfills the signature requirement of 43 CFR 3111.1-2(a) (1981), and it is improper to reject that offer because the photocopies were not personally signed.

Where a noncompetitive acquired lands oil and gas lease offeror submits one original lease offer form together with six copies of the front of the original form and six copies of the back of the form, the offeror has failed to comply with 43 CFR 3111.1-2(a) (1981), which specifies that each copy must be an exact reproduction of one page of both sides of the official approved one-page form. However, failure to submit properly reproduced copies of the form is a curable defect under 43 CFR 3111.1-1(e)(4) (1981).

James L. Casblos III, Christine C. Casblos, 78 IBLA 369 (Jan. 30, 1984)

BLM must reject a noncompetitive over-the-counter oil and gas lease offer filed pursuant to Sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976), to the extent that the land has been patented with no mineral reservation to the United States and in its entirety where the land cannot be enhanced within a 6-mile square area or an area not exceeding six surveyed sections in length and width and the first year's advance rental is deficient by more than 10 percent.

James M. Chudnow, John L. Poppinger, 79 IBLA 1 (Feb. 2, 1984)

An automated simultaneous oil and gas lease application Part B, Form 3112-6a, which does not reflect in the space designated "MARK SOCIAL SECURITY NUMBER" the same identification number used on the corresponding Part A, Form 3112-6, is not properly completed and must be deemed unacceptable.

Joan Chorpey, 79 IBLA 271 (Mar. 12, 1984)

Stella O. Redpath, 80 IBLA 174 (Apr. 13, 1984)

Under 43 CFR 3112.2-1(b), a simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship. Where there is no reference on the application to the signatory's relationship to the applicant, nor any reference to a qualifications file where the necessary information might be found, the requirements of the regulation have not been satisfied.

Pamela Ann Fiegle, 79 IBLA 276 (Mar. 13, 1984)

Where an automated simultaneous oil and gas lease application Part B, Form 3112-6a, does not contain a correct identification number in the circles under the space designated "MARK SOCIAL SECURITY NUMBER," it is not properly completed and is therefore unacceptable.

Newman Partnership, 79 IBLA 281 (Mar. 20, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

A noncompetitive oil and gas lease offer which is not accompanied by the required number of copies is properly rejected.

Helen G. Haggard, 79 IBLA 320 (Mar. 21, 1984)

Where, following a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit the executed lease agreement and advance rental within 10 days of receipt of notice, the application is properly rejected.

Paul C. Peters, 80 IBLA 121 (Apr. 3, 1984)

A simultaneous oil and gas lease application is properly rejected where the executed lease forms are not received by the proper BLM office within 10 days from receipt of notice of rental due.

P. A. Rapp, 80 IBLA 133 (Apr. 6, 1984)

Where an automated simultaneous oil and gas lease application Part B (Form 3112-6a) bears a different identification number in the space designated "MARK SOCIAL SECURITY NUMBER" than the identification number entered on Part A (Form 3112-6), the lease application is not properly completed and must be deemed unacceptable.

Thomas Connell, 80 IBLA 135 (Apr. 6, 1984)

Marvin A. Urquhart, Jr., 81 IBLA 370 (June 28, 1984)

Where there is no evidence of receipt of a check in payment of the first year's advance rental pursuant to 43 CFR 3112.4-1(a) (1982), the presumption that BLM employees have properly discharged their duties and not lost or misplaced the check is not overcome by an affidavit executed by applicant which states that the check was enclosed in the same envelope with other documents received by BLM, which affidavit includes a copy of applicant's personal checkbook register showing a check was issued to BLM.

S. H. Partners, 80 IBLA 153 (Apr. 9, 1984)

Where an automated simultaneous oil and gas lease application Part A, Form 3112-6, is either not on file at the time of the drawing or on file and contains a defect (more than one circle darkened per column) which prevents the computer from fully completing the automated processing of the application, the application is properly deemed to be unacceptable.

James R. Taylor, 80 IBLA 157 (Apr. 10, 1984)

A simultaneous oil and gas lease application submitted by an agent for an applicant which is not rendered in a manner to reveal the name of the potential lessee, the name of the signatory, and their relationship, is properly rejected.

Where BLM makes an inquiry because of an apparent discrepancy between a simultaneous oil and gas lease application and the corresponding lease offer, and applicant provides information that establishes the existence of a regulatory violation, the application

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

is properly rejected. Such information does not cure a deficiency; it proves a violation.

Jonas P. Beachy, 80 IBLA 209 (Apr. 26, 1984)

Where a simultaneous oil and gas lease application bears a date subsequent to the close of the filing period, but the evidence discloses that the application was dated, signed, and submitted to BLM during the filing period, and it is established that the misdating was merely inadvertent and not done with an intent to obtain a lease by fraud, the misdating is a nonsubstantive error which does not require the rejection of the application.

Billy W. Eddr, 80 IBLA 213 (Apr. 26, 1984)

Where an applicant for a simultaneous oil and gas lease submits a folded automated application, such application is properly deemed unacceptable under 43 CFR 3112.3(a) (48 FR 33679 (July 22, 1983)), and the applicant is entitled to a refund of filing fees after assessment of a $75 processing fee.

Frances Kunkel, 80 IBLA 333 (May 8, 1984)

An automated simultaneous oil and gas lease application Part B, Form 3112-6a, which is unsigned is not properly completed and must be found to be unacceptable.

Carey D. McDaniel, 80 IBLA 393 (May 14, 1984)

Where an automated simultaneous oil and gas lease application Part B, Form 3112-6a, does not contain a correct identification number in the space designated "BARK SOCIAL SECURITY NUMBER," which is the same number used in the corresponding Part A, form 3112-6, it is not properly completed and is therefore unacceptable.

David Earl Frye, 81 IBLA 49 (May 18, 1984)

Where an application form is deemed unacceptable under the automated simultaneous oil and gas leasing system, all filing fees tendered with such form are returned after assessment of a $75 processing fee, even if the deficiency which renders the form unacceptable is not discovered until after selection of successful applications.

Harold Eugene Turner, 81 IBLA 106 (May 30, 1984)

Where BLM mails a notice to a first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to submit a lease offer and tender the first year's rental in accordance with 43 CFR 3112.4-1(a), the applicant will be deemed to have received the notice if it was sent to the applicant's last address of record, regardless of whether it was in fact received by him. However, when a letter is returned to BLM as undeliverable, BLM should examine the case record to see if it contains an updated address. If an updated address would be found upon proper examination, the notice must be sent to the new address to effect service.

Stephen C. Ritchie, 81 IBLA 162 (May 31, 1984)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

Where the identification number on an automated simultaneous oil and gas lease application form Part B differs from that on Part A, the application is unacceptable, and appellant is entitled to a refund of her filing fees paid in excess of $75 per application form as a result.

Mary Nan Spear, 81 IBLA 220 (June 6, 1984)

A first-drawn oil and gas lease application, Form 3112-6a, is properly rejected where there is no proper Form 3112-6 on file with the Bureau of Land Management at the time of the drawing.

Judy Fleming, 81 IBLA 290 (June 12, 1984)

Where a simultaneously filed oil and gas lease application is executed in a manner which incorporates numerous errors and violates several regulations, and thus creates ambiguities which cannot be resolved without the subsequent submission of further information, the application should be rejected. The fact that certain of these errors or violations have been held to be trivial or nonsubstantive when considered individually in other cases cannot serve to mitigate the cumulative effect of all of them appearing in a single application.

Maurice W. Coburn (On Reconsideration), 82 IBLA 112 (July 24, 1984)

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer for acquired military lands which were subject to a Secretarial moratorium on noncompetitive oil and gas leasing at the time that the offer was filed, even where the Secretary has thereafter rescinded the moratorium, but has provided that the land will be leased under the simultaneous oil and gas leasing system.

Barrick Exploration Co., 82 IBLA 172 (Aug. 7, 1984)

Failure of a first-drawn simultaneous oil and gas lease application to reveal the relationship between the person signing the application and the corporate applicant, contrary to provision of 43 CFR 3112.2-1(b), does not constitute a substantial defect so as to prevent lease issuance, where a reviewing United States District Court finds that the Bureau of Land Management employees concerned have actual knowledge of the relationship.

ANR Production Co., 82 IBLA 228 (Aug. 23, 1984)

Where the identification number on an automated simultaneous oil and gas lease application form Part B differs from that on Part A, the application is unacceptable.

Nancy Spencer, 82 IBLA 245 (Aug. 28, 1984)

Reinstatement

A noncompetitive oil and gas lease offer filed "over-the-counter" is properly rejected when the accompanying rental payment is deficient by more than 10 percent. However, in appropriate circumstances, if the balance of the rental is paid prior to rejection by

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Reinstatement--Continued

BLM and there are no intervening rights of third parties, the offer may be reinstated with priority from the date the deficiency is corrected.

Joe M. Johnson, 78 IBLA 382 (Jan. 31, 1984)

640-acre Limitation

Where a junior offeror challenges the issuance of a lease to a senior offeror on the basis that the senior offer improperly included 320 acres of land not available for noncompetitive leasing and thereby asserts that the lease could have only issued for less than 640 acres of land, the appeal is properly rejected where the record shows that, irrespective of the 320 acres in question, there still remained 640 acres of other public land within the lease offer as required by 43 CFR 3110.1-3(a).

John D. LaRue, 78 IBLA 239 (Jan. 10, 1984)

Where a subdivision which is available for oil and gas leasing in one township would normally be adjacent to land similarly available in another township, a holding that a lease offer for one such subdivision which does not include the other is violative of the "640-acre rule" will be vacated upon a showing that the two townships are offset and the subdivisions concerned are not actually adjacent.

Irvin Wall (On Reconsideration), 80 IBLA 339 (May 10, 1984)

Six-mile Square Rule

BLM must reject a noncompetitive over-the-counter oil and gas lease offer filed pursuant to sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976), to the extent that the land has been patented with no mineral reservation to the United States and in its entirety where the land cannot be embraced within a 6-mile square area or an area not exceeding six surveyed sections in length and width and the first year's advance rental is deficient by more than 10 percent.

James K. Chudnow, John L. Messinger, 79 IBLA 1 (Feb. 2, 1984)

CANCELLATION

BLM must cancel a noncompetitive oil and gas lease of acquired lands where it is determined after lease issuance that the lands are situated within the boundaries of an incorporated city. Such lands are not subject to oil and gas leasing under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (Supp. V 1981).

Robert Lyon, 78 IBLA 232 (Jan. 9, 1984)

It is improper to attempt to cancel an oil and gas lease in part where it has not been shown that the lease was issued in contravention of any statutory or regulatory provision, and where an assignment of the lease has previously been submitted to BLM by a bona fide purchaser, with a request for approval.

Beverly M. Harris, Amigoil, Inc., 78 IBLA 251 (Jan. 10, 1984)

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

Where a noncompetitive oil and gas lease erroneously reflects a lesser mineral interest in federally owned lands than is actually held by the United States, but where the lease has not been issued in contravention of any regulatory or statutory authority, it need not be canceled, but may be amended to reflect that all of the available Federal interest in the land has, in fact, been leased.

Horace W. Alvord IV, 80 IBLA 49 (Mar. 28, 1984)

Cancellation of a lease or portion of a lease is improper when it was not issued in violation of any statute or regulation.

John Bloyce Castle, 81 IBLA 53 (May 22, 1984)

BLM has no authority under the Mineral Leasing Act as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 226(b) (1982), to issue a noncompetitive oil and gas lease for land within a designated tar sand area. A noncompetitive lease improvidently issued after the enactment of the amendment in violation of its requirements is properly canceled upon discovery of the error.

Dorothy Langley, 81 IBLA 349 (June 25, 1984)

Where an oil and gas lease has been issued for lands which have been withdrawn from the public domain by Executive Order for Indian purposes, the lease must be canceled. The Secretary of the Interior has the authority to cancel any oil and gas lease which is issued contrary to law.

Navajo Tribe of Indians, 82 IBLA 387 (Sept. 13, 1984)

COMMUNITIZATION AGREEMENTS

Under recent amendments to 43 CFR 3105.2-3 (published at 48 FR 33670 (July 22, 1983)), a communitization agreement affecting a Federal oil and gas lease may be approved retroactively and serve to extend a Federal lease, even when the agreement is not submitted to the Department until after the expiration date of the Federal lease, so long as the communitization agreement has been executed prior to the expiration date.

Bruce Anderson, 80 IBLA 286 (May 4, 1984) 91 I.D. 203

COMPENSATORY ROYALTY

A lease may be extended beyond its primary term under 43 CFR 3107.2-1 (1982) only where the lessee has been notified that the Department has made an initial determination that drainage is occurring and the lessee has informed the Department, prior to the lease expiration date, of his willingness to tender compensatory royalty in accordance with its determination or has actually tendered such royalty in response to an assessment before the lease expiration date.

Bruce Anderson, 80 IBLA 286 (May 4, 1984) 91 I.D. 203

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES

An offeror for a Federal oil and gas lease has no rights in the land or its minerals until the lease is issued to it. The Secretary of the Interior is not required to, but "may," issue a lease for any given tract. Therefore, BLM can properly reject a noncompetitive lease offer where the lands are included in a favorable petroleum geological province, which is leaseable only through competitive bidding pursuant to the Mineral Leasing Act of 1920, as modified by the Alaska National Interest Lands Conservation Act.

E. B. Joiner, 78 IBLA 323 (Jan. 24, 1984)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to ascertain the existence of a rational basis for the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a rational basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A justification memorandum that does not reveal the estimated minimum value for the parcel and sufficient factual data to establish a rational basis therefor cannot support rejection of the high bid for the parcel.

Southern Union Exploration Co., 79 IBLA 90 (Feb. 16, 1984)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A justification memorandum that does not reveal the estimated minimum value for the parcel and sufficient factual data cannot support rejection of the high bid for the parcel.

Southern Union Exploration Co., 79 IBLA 225 (Feb. 29, 1984)

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, notwithstanding any immaterial defects in BLM's analysis, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Viking Resources Corp., 80 IBLA 245 (Apr. 30, 1984)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A record that does not reveal the estimated minimum acceptable value for a parcel and sufficient factual data indicating the derivation of

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

that value cannot support rejection of the high bid for the parcel.

Larry White, 81 IBLA 19 (May 15, 1984)

R. E. Nakaoka, 81 IBLA 197 (June 1, 1984)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Mesa Petroleum Co., 81 IBLA 194 (June 1, 1984)

BLM has no authority under the Mineral Leasing Act as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 226(b) (1982), to issue a noncompetitive oil and gas lease for land within a designated tar sand area. A noncompetitive lease improvidently issued after the enactment of the amendment in violation of its requirements is properly canceled upon discovery of the error.

Dorothy Langley, 81 IBLA 349 (June 25, 1984)

The Secretary of the Interior has the authority to reject a high bid in a competitive oil and gas lease sale where the record shows a rational basis for the conclusion that the amount of the bid was inadequate.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A record that does not reveal the presale evaluation for a parcel and sufficient factual data indicating the derivation of that value cannot support rejection of the high bid for the parcel.

Kevin J. Bliss et al., 82 IBLA 31 (July 6, 1984)

Where a competitive oil and gas lease imposes additional stipulations without prior notice to the offeror, the offeror may accept or reject the lease containing the additional stipulations. The imposition of additional stipulations without notice to the offeror defers the 15-day period in 43 CFR 3132.5(a) until the offeror has notice of the stipulations to be included in the lease.

Texaco U.S.A. et al., 82 IBLA 61 (July 11, 1984)

Shell Oil Co. et al., 83 IBLA 22 (Sept. 21, 1984)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

Clarence Sherman, 82 IBLA 64 (July 12, 1984)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

A BLM decision rejecting a high bid for a parcel of land in a competitive oil and gas lease sale as inadequate will be affirmed where appellant fails to overcome the Government's prima facie showing of the correctness of its estimated minimum acceptable fair market value for the parcel and to establish that appellant's bid reasonably reflects fair market value.

The Westlands Co., 82 IBLA 129 (July 25, 1984)

The Westlands Co., 83 IBLA 43 (Sept. 24, 1984)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to verify a rational basis for the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a factual basis sufficient to support the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Craig Folson, 82 IBLA 294 (Aug. 31, 1984)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Michael Shearn, 83 IBLA 53 (Sept. 24, 1984)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Ronald F. Agel, 83 IBLA 76 (Sept. 28, 1984)

OIL AND GAS LEASES--Continued

CONSENT OF AGENCY

The Secretary of the Interior may require an oil and gas lease offeror to accept stipulations reasonably designed to protect environmental and other land use values as a condition precedent to the issuance of a lease for land located in a national forest. Where on appeal an offeror registers objections concerning such stipulations, and the Forest Service subsequently clarifies the nature of the stipulations and the offeror raises no further complaints, the imposition of the stipulation will be upheld.

James M. Chudnow, Laurent A. Glesbert, 78 IBLA 317 (Jan. 24, 1984)

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1976), requires that the consent of the administrative agency having jurisdiction over acquired land described in an oil and gas lease offer be obtained prior to the issuance of a lease for such land. Absent such consent, the Department of the Interior is without authority to issue a lease.

Frederick L. Smith, 78 IBLA 345 (Jan. 25, 1984)

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1976), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease. Where an offeror seeks to lease lands under the jurisdiction of the Department of the Navy, and that Department refuses consent, no lease may issue.

Union Oil Co. of California, Stephen E. Buhals, 79 IBLA 86 (Feb. 16, 1984)

DESCRIPTION OF LAND

Where 43 CFR 3101.2-3(b)(3) (1982) allowed the use of the acquisition tract number assigned by the acquiring agency to identify land sought to be leased, an acquired lands oil and gas lease offer using numbers assigned by the acquiring agency and accompanied by a map on which the location of individual tracts within the administrative unit is clearly marked and labeled is acceptable.

Leon K. Scully, Jr., Paul D. Reaird, 79 IBLA 117 (Feb. 22, 1984)

Where an oil and gas lease offer for unsurveyed, acquired lands in the Monongahela National Forest is protested on the basis that the metes and bounds description of the lands sought fails to close, and the protest is dismissed because even though the description does not close, the offer is accompanied by a map clearly showing the desired lands, such dismissal is improper. Notwithstanding the inclusion of the map, a description that fails to close is a defective description which does not entitle the offeror to the award of a lease thereto.

Amoco Production Co., 81 IBLA 323 (June 19, 1984)

OIL AND GAS LEASES--Continued

DESCRIPTION OF LAND--Continued

A description in an over-the-counter offer for the SE 1/4 SE 1/4 sec. 9, T. 3 N., R. 32 W., fifth principal meridian, less and except a 5-acre parcel that the applicant describes by a metes and bounds description tied to the nearest existing survey corner is sufficient to satisfy the regulation governing land descriptions of surveyed public domain.

Tim R. Smith, 81 IBLA 337 (June 21, 1984)

A noncompetitive acquired lands oil and gas lease offer for lands not surveyed under the rectangular system for public land surveys is properly rejected where the offeror fails to include a map, where land is included in the description which is not owned by the United States, or where the land description is inadequate.

James M. Chudnow, 82 IBLA 95 (July 19, 1984)

DISCRETION TO LEASE

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to ascertain the existence of a rational basis for the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a rational basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A justification memorandum that does not reveal the estimated minimum value for the parcel and sufficient factual data to establish a rational basis therefor cannot support rejection of the high bid for the parcel.

Southern Union Exploration Co., 79 IBLA 90 (Feb. 16, 1984)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A justification memorandum that does not reveal the estimated minimum value for the parcel and sufficient factual data cannot support rejection of the high bid for the parcel.

Southern Union Exploration Co., 79 IBLA 225 (Feb. 29, 1984)

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, notwithstanding any immaterial defects in BLM's analysis, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Viking Resources Corp., 80 IBLA 245 (Apr. 30, 1984)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

BLM may, in its discretion, reject any offer to lease Federal lands for oil and gas upon a determination supported by facts of record that leasing would not be in the public interest, e.g., where leasing might adversely affect the Yuma clapper rail, a federally listed endangered species.

Where BLM rejects an oil and gas lease offer, in order to protect a federally listed endangered species, the record should ordinarily reflect consideration of whether leasing subject to protective stipulations, including no surface occupancy, would not adequately serve the public interest. Where the record indicates that BLM failed to consider alternatives to no leasing, the case will be remanded to BLM for such an assessment.

BLM may properly reject an oil and gas lease offer in order to protect a federally listed endangered species pending the availability of further studies of the effect of oil and gas exploration and development on a resident population of that species.

Chevron U.S.A., Inc., 80 IBLA 324 (May 8, 1984)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A record that does not reveal the estimated minimum acceptable value for a parcel and sufficient factual data indicating the derivation of that value cannot support rejection of the high bid for the parcel.

Larry White, 81 IBLA 19 (May 15, 1984)

R. T. Nakaoka, 81 IBLA 197 (June 1, 1984)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Mesa Petroleum Co., 81 IBLA 194 (June 1, 1984)

Michael Shearn, 83 IBLA 53 (Sept. 24, 1984)

BLM may, in its discretion, decline to issue an oil and gas lease, pursuant to an over-the-counter offer, where its records do not clearly show that the title to the oil and gas is in the United States. Prior to such action, however, BLM should afford the offeror an opportunity to show that the United States does, in fact, own title to the oil and gas interests in the lands sought to be leased.

Russell H. Green, Jr., 81 IBLA 201 (June 1, 1984)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

The Secretary of the Interior has the authority to reject a high bid in a competitive oil and gas lease sale where the record shows a rational basis for the conclusion that the amount of the bid was inadequate.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A record that does not reveal the presale evaluation for a parcel and sufficient factual data indicating the derivation of that value cannot support rejection of the high bid for the parcel.

Kevin J. Bliss et al., 82 IBLA 31 (July 6, 1984)

If an oil and gas lease is to be issued for a particular tract, it must be issued to the first-qualified applicant. An application filed pursuant to the simultaneous filing procedure and selected with first priority is a noncompetitive application to lease for oil and gas and does not create a property right in the applicant but is merely a hope or expectation. The Secretary of the Interior may, in his discretion, reject any application to lease for oil and gas. An application, however, may not be rejected on a basis other than that permitted by law.

Nola Grace Ptasynski, 82 IBLA 48 (July 11, 1984)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

Clarence Sherman, 82 IBLA 64 (July 12, 1984)

A BLM decision rejecting a high bid for a parcel of land in a competitive oil and gas lease sale as inadequate will be affirmed where appellant fails to overcome the Government's prima facie showing of the correctness of its estimated minimum acceptable fair market value for the parcel and to establish that appellant's bid reasonably reflects fair market value.

The Westlands Co., 82 IBLA 129 (July 25, 1984)

The Westlands Co., 83 IBLA 43 (Sept. 24, 1984)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to verify a rational basis for the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a factual basis sufficient to support the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Craig Folson, 82 IBLA 294 (Aug. 31, 1984)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Ronald C. Agel, 83 IBLA 76 (Sept. 28, 1984)

EXPIRATION

Under recent amendments to 43 CFR 3105.2-3 (published at 48 FR 33670 (July 22, 1983)), a communitization agreement affecting a Federal oil and gas lease may be approved retroactively and serve to extend a Federal lease, even when the agreement is not submitted to the Department until after the expiration date of the Federal lease, so long as the communitization agreement has been executed prior to the expiration date.

A lease may be extended beyond its primary term under 43 CFR 3107.2-1 (1982) only where the lessee has been notified that the Department has made an initial determination that drainage is occurring and the lessee has informed the Department, prior to the lease expiration date, of his willingness to tender compensatory royalty in accordance with its determination or has actually tendered such royalty in response to an assessment before the lease expiration date.

Bruce Anderson, 80 IBLA 286 (May 4, 1984) 91 I.D. 203

An oil and gas lease expires upon the running of its primary term unless eligible for extension as provided by 43 CFR Subpart 3701. While a request for suspension of a lease may be retroactively approved after the lease has expired, no suspension application may be approved where the application itself is not filed until after the expiration date of the lease, unless it can be found that actions of the Department have constituted a de facto suspension of the lease during its term.

William C. Kirkwood, 81 IBLA 204 (June 1, 1984)

EXTENSIONS

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the lands in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for as long as committed provided that production is obtained within the unit prior to expiration of the term of the lease. Upon commitment and segregation of the nonproducing portion of a producing oil and gas lease prior to expiration of its primary term or its extended term (other than by production), production

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

on the nonunitized portion of the lease will not serve to extend the unitized portion.

Conoco, Inc., 80 IBLA 161 (Apr. 11, 1984) 91 I.D. 181

Under recent amendments to 43 CFR 3105.2-3 (published at 48 FR 33670 (July 22, 1983)), a communitization agreement affecting a Federal oil and gas lease may be approved retroactively and serve to extend a Federal lease, even when the agreement is not submitted to the Department until after the expiration date of the Federal lease, so long as the communitization agreement has been executed prior to the expiration date.

A lease may be extended beyond its primary term under 43 CFR 3107.9-1 (1982) only where the lessee has been notified that the Department has made an initial determination that drainage is occurring and the lessee has informed the Department, prior to the lease expiration date, of his willingness to tender compensatory royalty in accordance with its determination or has actually tendered such royalty in response to an assessment before the lease expiration date.

Bruce Anderson, 80 IBLA 286 (May 4, 1984) 91 I.D. 203

A finding that an oil and gas lease has expired for failure of one of several lessees of record to execute a joinder to a unit agreement for a producing unit will be set aside, in the absence of intervening rights in the leasehold, where a substantial allegation is made that an assignment of record was intended by the parties to convey all the interest of that lessee to an assignee who timely executed a joinder to the unit agreement.

Monsanto Co., 82 IBLA 108 (July 24, 1984)

FIRST-QUALIFIED APPLICANT

An oil and gas lease offer must be rejected when the land applied for has been leased to a senior offeror under a proper offer.

Hollyether Exploration Co., 78 IBLA 188 (Jan. 4, 1984)

Marlin Exploration, Inc., 79 IBLA 259 (Mar. 6, 1984)

Charles E. Shaw, 81 IBLA 347 (June 25, 1984)

A junior over-the-counter noncompetitive oil and gas lease offer is properly rejected where the lands have been leased to a senior offeror and the junior offeror fails to provide valid reasons why the senior offer should be considered defective.

John D. Lange, 78 IBLA 239 (Jan. 10, 1984)

An oil and gas lease offer is properly rejected under provision of 43 CFR 3111.1-1(a) where the offeror signs only two copies of five submitted lease offer forms.

Gian R. Cassarino, 78 IBLA 242 (Jan. 10, 1984) 91 I.D. 9

OIL AND GAS LEASES--Continued

FIRST-QUALIFIED APPLICANT--Continued

Failure of an applicant to date a simultaneous oil and gas lease application in accordance with 43 CFR 3112.2-1(c) (1982) does not require rejection of the application.

Billie L. Emrick, 78 IBLA 358 (Jan. 27, 1984)

Harvey Howard Trott, 79 IBLA 146 (Feb. 23, 1984)

Where an acquired lands oil and gas lease offeror signs an offer form in ink, photocopies exact reproductions of the offer form, including the signature, with the intent that the photocopied signature be his signature, and submits the documents as the offer, that offer fulfills the signature requirement of 43 CFR 3111.1-2(a) (1981), and it is improper to reject that offer because the photocopies were not personally signed.

James L. Caplow III, Christine C. Caplow, 78 IBLA 369 (Jan. 30, 1984)

An applicant receiving priority in a drawing of simultaneously filed oil and gas lease applications who fails to submit the payment of the proper amount of advance rental within 30 days after receipt of a notice that payment is due, as prescribed by 43 CFR 3112.4-1(a), is automatically disqualified to receive a lease.

R. W. Jones, 79 IBLA 295 (Mar. 20, 1984)

A simultaneous oil and gas lease application is properly rejected where the executed lease forms are not received by the proper BLM office within 30 days from receipt of notice of rental due.

R. A. Page, 80 IBLA 133 (Apr. 6, 1984)

An applicant cannot receive any priority based on an application deemed to be unacceptable, even though the application is included in the selection process and selected with priority.

Howell Roberts Speak, 80 IBLA 150 (Apr. 6, 1984)

Where, in a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit his first year's advance rental payment within 30 days after receipt of notice, as prescribed by 43 CFR 3112.4-1(a) (1982), his lease offer must be rejected.

S. H. Partners, 80 IBLA 153 (Apr. 9, 1984)

In Lowry v. Watt, 684 F.2d 957 (D.C. Cir. 1982), and Corse v. Watt, 720 F.2d 626 (10th Cir. 1983), the amendment and disclaimer of Fred L. Engle, d.b.a. Resource Service Co. was held to be effective to waive the exclusive agency provision that formed part of the company's contract with its clients. The waiver being effective, neither the company nor Engle possessed an interest in a client's offer at the time of a drawing of simultaneously filed oil and gas lease offers so as to invalidate the offer.

Michigan Wisconsin Pipeline Co. (On Reconsideration), Geosearch, Inc., John A. Rochester, 80 IBLA 317 (May 7, 1984)

OIL AND GAS LEASES--Continued

FIRST-QUALIFIED APPLICANT--Continued

Where, in a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit his executed lease agreement and first year's advance rental payment within 30 days after receipt of notice to do so, as prescribed by 43 CFR 3112.6-1(a), his lease application must be rejected.

Fred William Berger, 81 IBLA 344 (June 25, 1984)

If an oil and gas lease is to be issued for a particular tract, it must be issued to the first-qualified applicant. An application filed pursuant to the simultaneous filing procedure and selected with first priority is a noncompetitive application to lease for oil and gas and does not create a property right in the applicant but is merely a hope or expectation. The Secretary of the Interior may, in his discretion, reject any application to lease for oil and gas. An application, however, may not be rejected on a basis other than that permitted by law.

The first-qualified applicant for an oil and gas lease acquires no vested right to have a lease issued to him but only a right to be preferred over other applicants if a lease is to be issued and his application may be rejected if it is determined that a previously terminated lease including the lands sought for leasing should be reinstated under sec. 401 of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2447, which amended sec. 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982).

Nola Grace Piasynski, 82 IBLA 48 (July 11, 1984)

In a simultaneous oil and gas lease drawing, the first-qualified applicant drawn with first priority is entitled to receive the lease. An appeal is properly dismissed where the appellant fails to point out the grounds on which the decision appealed from is in error, and the allegations in his statement of reasons are irrelevant and immaterial.

Chickasaw Oil & Gas, Inc., 82 IBLA 59 (July 11, 1984)

BLM may not properly reject a simultaneous oil and gas lease application where the application is signed on behalf of the applicant and the signature includes the title of the applicant as "partner" or a particular partnership, designated as another party in interest, since it is possible to determine the identity of the applicant and the word referring to title should have been treated as surplusage.

Ann M. Davis et al., 82 IBLA 151 (July 30, 1984)

KNOWN GEOLOGIC STRUCTURE

Under 30 U.S.C. § 226(b) (Supp. V 1981), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geological structure of a producing oil or gas field has the burden of showing that the determination is in error. Absent any argument of fact or evidence suggesting such error, the determination will be upheld.

Stephen M. Naslund, 79 IBLA 252 (Mar. 5, 1984)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

A known geologic structure is a trap, either structural or stratigraphic in nature, in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, and which includes all acreage that is presumptively productive.

Land within a known geologic structure of a producing oil or gas field may only be leased after competitive bidding.

An applicant for a noncompetitive acquired lands oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Reed International, 80 IBLA 145 (Apr. 6, 1984)

Where the Minerals Management Service determines part of a noncompetitive oil and gas lease issued in 1971 to be within an undefined known geologic structure, a decision to increase rental to $2 per acre is erroneous where the record shows the lease is committed to an approved unit plan with a well capable of production, with a general provision for allocation of production but all the lease acreage is outside the participating area. An increase of rental rate is not appropriate for such a lease where the terms of the lease specifically direct that the rental rate remain at $0.50 per acre.

Dyco Petroleum Corp., 81 IBLA 65 (May 22, 1984)

Where the Minerals Management Service determines part of noncompetitive oil and gas leases issued in 1971 and 1972 to be within an undefined known geologic structure, a decision to increase rental for all acreage to $2 per acre is erroneous where the record shows the lease is committed to an approved unit plan with a well capable of production and a general provision for allocation of production. Where the terms of the leases specifically direct that the rental rate remain at $0.50 per acre for acreage outside a participating area, an increased rental rate is not appropriate for that acreage.

Pioneer Partners, 82 IBLA 101 (July 24, 1984)

Where BLM rejects a noncompetitive oil and gas lease offer because of a determination that the land is within the known geologic structure of a producing oil or gas field and fails to support the decision in the record, the decision will be set aside and the case remanded to substantiate the basis of the KGS determination in light of the information tendered by the offeror on appeal.

Thomas Connell, 82 IBLA 132 (July 27, 1984)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

Where a simultaneous oil and gas lease applicant, whose application has been rejected because it covers land within a known geologic structure, submits probative evidence contravening the determination that the land is presumptively productive of oil and gas, which is not fully rebutted, but where, nonetheless, questions of fact remain unresolved by the record, a

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

hearing is appropriate to establish a sufficient record to permit decision.

Lloyd Chemical Sales, Inc., 82 IBLA 182 (Aug. 13, 1984)

Where BLM has determined that any part of the lands described in a noncompetitive oil and gas lease is within an undefined known geologic structure, the lessee is required to pay increased rental in accordance with 43 CFR 3103.3-2(b)(1) (1982).

Livingston & Cowdis Exploration, Inc., 82 IBLA 336 (Sept. 12, 1984)

LANDS SUBJECT TO

BLM must cancel a noncompetitive oil and gas lease of acquired lands where it is determined after lease issuance that the lands are situated within the boundaries of an incorporated city. Such lands are not subject to oil and gas leasing under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (Supp. V 1981).

Robert Lyon, 78 IBLA 232 (Jan. 9, 1984)

43 CFR 3112.1-1 provides that all lands which are not within a known geological structure and are covered by a lease which expires by operation of law are subject to leasing only in accordance with 43 CFR Subpart 3112.

Joe H. Johnson, 78 IBLA 382 (Jan. 31, 1984)

Where oil and gas deposits in lands acquired by the United States and devoted to use for military purposes become "surplus property" under the Federal Property and Administrative Services Act, such deposits may be leased only under the provisions of that Act, and are not subject to leasing under the Mineral Leasing Act for Acquired Lands.

Jerald A. Waters, 78 IBLA 387 (Jan. 31, 1984)

BLM must reject a noncompetitive over-the-counter oil and gas lease offer filed pursuant to sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976), to the extent that the land has been patented with no mineral reservation to the United States and in its entirety where the land cannot be embraced within a 6-mile square area or an area not exceeding six surveyed sections in length and width and the first year's advance rental is deficient by more than 10 percent.

James R. Chadnow, John L. Messinger, 79 IBLA 1 (Feb. 2, 1984)

Generally, unless the mineral leasing laws or a withdrawal or reservation order specifically provides otherwise, the lands withdrawn or reserved for a specific purpose are available for leasing under the mineral leasing laws, if issuance of a mineral lease would not be inconsistent with or interfere with the purpose for which the lands are withdrawn or reserved.

TXO Production Corp., 79 IBLA 81 (Feb. 16, 1984)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Acquired lands situated within the boundaries of incorporated cities, towns, or villages are excluded from leasing under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1976).

Jerry Waters, 79 IBLA 198 (Feb. 28, 1984)

A noncompetitive over-the-counter oil and gas lease offer is properly rejected where the subject lands were previously held in an oil and gas lease which terminated. Such land can only be made available for leasing again through a simultaneous offering pursuant to 43 CFR Subpart 3112.

Helen G. Haggard, 79 IBLA 320 (Mar. 21, 1984)

A. Z. Shaw, 82 IBLA 86 (July 17, 1984)

The 1984 Continuing Resolution (98 Stat. 151) provides, at sec. 137, that no funds shall be used to process or grant oil and gas lease applications or offers on any Federal lands, outside Alaska, that are units of the National Wildlife Refuge Syste, except where there are valid existing rights or where the lands are subject to drainage, unless and until the Secretary of the Interior promulgates revisions to the existing regulations so as to explicitly authorize the leasing of such lands; holds a public hearing with respect to such revision; and prepares an environmental ispact statement with respect thereto. All action upon affected oil and gas lease applications or offers filed before Nov. 14, 1983, is properly suspended until completion of the necessary steps.

Wingelinc Overthrust Oil & Gas, Inc., 80 IBLA 4 (Mar. 27, 1984)

BLM properly rejects a noncompetitive oil and gas lease offer under 43 CFR 3101.3-3(a) (1982) for land within the Columbia National Wildlife Refuge, which was withdrawn for the protection of all species of wildlife.

D. M. Yates, 80 IBLA 140 (Apr. 6, 1984)

D. M. Yates, 82 IBLA 389 (Sept. 13, 1984)

BLM may, in its discretion, reject any offer to lease Federal lands for oil and gas upon a determination supported by facts of record that leasing would not be in the public interest, e.g., where leasing might adversely affect the Yuma clapper rail, a federally listed endangered species.

Where BLM rejects an oil and gas lease offer, in order to protect a federally listed endangered species, the record should ordinarily reflect consideration of whether leasing subject to protective stipulations, including no surface occupancy, would not adequately serve the public interest. Where the record indicates that BLM failed to consider alternatives to no leasing, the case will be resanded to BLM for such an assessment.

BLM may properly reject an oil and gas lease offer in order to protect a federally listed endangered species pending the availability of further studies of the effect of oil and gas exploration and development on a resident population of that species.

Chevron U.S.A., Inc., 80 IBLA 324 (May 8, 1984)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Where a subdivision which is available for oil and gas leasing in one township would normally be adjacent to land similarly available in another township, a holding that a lease offer for one such subdivision which does not include the other is violative of the "640-acre rule" will be vacated upon a showing that the two townships are offset and the subdivisions concerned are not actually adjacent.

Irvin Hall (On Reconsideration), 80 IBLA 339 (May 10, 1984)

Land within the Columbia National Wildlife Refuge, established by Public Land Order No. 283, qualifies as "wildlife refuge land" and, thus, is subject to the prohibition on oil and gas leasing under 43 CFR 3101.5-1(b) (1983). A noncompetitive oil and gas lease for such land is properly rejected pursuant to the regulation.

D. M. Yates, 81 IBLA 160 (May 31, 1984)

Lands underlying the navigable waters of the State of Michigan passed to the State at the time of its admission to statehood. After passage of the lands to the State, the ownership of the said lands became a matter of State law. In the State of Michigan the title and rights with respect to inland waterways are governed by the same rules of law, regardless of the size of the waterway. Under Michigan law, the riparian and littoral proprietors own to the middle of both navigable and nonnavigable lakes and rivers. By application of Michigan law, when the Federal Government is the owner of the riparian or littoral lands, the Federal Government also is the owner of the appurtenant bottom lands by acquisition from the State of Michigan, and the oil and gas contained in such appurtenant lands are owned by the United States.

Gay E. Jones, 81 IBLA 300 (June 13, 1984)

BLM has no authority under the Mineral Leasing Act as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 226(b) (1982), to issue a noncompetitive oil and gas lease for land within a designated tar sand area. A noncompetitive lease improvidently issued after the enactment of the amendment in violation of its requirements is properly canceled upon discovery of the error.

Dorothy Langley, 81 IBLA 349 (June 25, 1984)

It is a general rule that a meander line is not a line of boundary but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the waterline itself. The "Basset exception" to this rule is that if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within the meander line. In determining the applicability of the "Basset exception," consideration must also be given to equitable factors, including unjust enrichment.

Ellis L. & Johnson, Marilyn Johnson, 82 IBLA 135 (July 27, 1984)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer for acquired military lands which were subject to a Secretarial moratorium on noncompetitive oil and gas leasing at the time that the offer was filed, even where the Secretary has thereafter rescinded the moratorium, but has provided that the land will be leased under the simultaneous oil and gas leasing system.

Barrick Exploration Co., 82 IBLA 172 (Aug. 7, 1984)

"Reserved," "set apart," "withdrawn." Lands which are "reserved" and "set apart" for the protection and preservation of wildlife pursuant to the Migratory Bird Conservation Act of 1929, as amended, are "withdrawn" for the protection of all species of wildlife within the meaning of 43 CFR 3101.3-3(a)(1).

Richard F. Price, Jr., 82 IBLA 257 (Aug. 29, 1984)

Acquired lands situated within the boundaries of incorporated cities, towns, or villages are excluded from mineral leasing by sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1982).

Jerald A. Waters, 82 IBLA 334 (Sept. 12, 1984)

Where an oil and gas lease has been issued for lands which have been withdrawn from the public domain by Executive Order for Indian purposes, the lease must be canceled. The Secretary of the Interior has the authority to cancel any oil and gas lease which is issued contrary to law.

Navajo Tribe of Indians, 82 IBLA 387 (Sept. 13, 1984)

NONCOMPETITIVE LEASES

An oil and gas lease offer must be rejected when the land applied for has been leased to a senior offeror under a proper offer.

Bellwether Exploration Co., 78 IBLA 188 (Jan. 4, 1984)

Mardan Exploration, Inc., 79 IBLA 259 (Mar. 6, 1984)

Charles E. Shaw, 81 IBLA 347 (June 25, 1984)

A defect in a noncompetitive oil and gas lease offer may, in the case of over-the-counter offers to lease, be curable. If the defect in the offer is cured, the offer obtains priority on the date it is correctly completed. However, while this rule has been applied in the past to permit offerors to rectify disqualifying errors and omissions after BLM has properly rejected them, the Board now finds that practice to be inappropriate and contrary to public policy and efficient administration. Henceforth, no "curative" submissions will be received by the Board of Land Appeals to reinstate lease offers which have correctly been rejected by BLM because of the deficiency.

Gian F. Cassarino, 78 IBLA 242 (Jan. 10, 1984)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

Under 30 U.S.C. § 226(b) (Supp. V 1981), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geological structure of a producing oil or gas field has the burden of showing that the determination is in error. Absent any argument of fact or evidence suggesting such error, the determination will be upheld.

Stephen M. Naslund, 79 IBLA 252 (Mar. 5, 1984)

A simultaneous oil and gas lease application is properly rejected where the executed lease forms are not received by the proper BLM office within 30 days from receipt of notice of rental due.

R. A. Rapp, 80 IBLA 133 (Apr. 6, 1984)

A known geologic structure is a trap, either structural or stratigraphic in nature, in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, and which includes all acreage that is presumptively productive.

Land within a known geologic structure of a producing oil or gas field may only be leased after competitive bidding.

An applicant for a noncompetitive acquired lands oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Reed International, 80 IBLA 145 (Apr. 6, 1984)

If an oil and gas lease is to be issued for a particular tract, it must be issued to the first-qualified applicant. An application filed pursuant to the simultaneous filing procedure and selected with first priority is a noncompetitive application to lease for oil and gas and does not create a property right in the applicant but is merely a hope or expectation. The Secretary of the Interior may, in his discretion, reject any application to lease for oil and gas. An application, however, may not be rejected on a basis other than that permitted by law.

Nola Grace Plasynski, 82 IBLA 48 (July 11, 1984)

In a simultaneous oil and gas lease drawing, the first-qualified applicant drawn with first priority is entitled to receive the lease. An appeal is properly dismissed where the appellant fails to point out the grounds on which the decision appealed from is in error, and the allegations in his statement of reasons are irrelevant and immaterial.

Chickasaw Oil & Gas, Inc., 82 IBLA 59 (July 11, 1984)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

Where BLM rejects a noncompetitive oil and gas lease offer because of a determination that the land is within the known geologic structure of a producing oil or gas field and fails to support the decision in the record, the decision will be set aside and the case remanded to substantiate the basis of the KGS determination in light of the information tendered by the offeror on appeal.

Thomas Connell, 82 IBLA 132 (July 27, 1984)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

Lloyd Chemical Sales, Inc., 82 IBLA 182 (Aug. 13, 1984)

REINSTATEMENT

Under 30 U.S.C. § 188(c) (1976), a lease terminated automatically for untimely payment of annual rental may be reinstated where the rental is paid within 20 days and upon receipt of a petition for reinstatement showing that reasonable diligence was exercised or that the failure to make timely payment was justifiable. In the absence of such proof, the petition for reinstatement is properly denied.

Reasonable diligence ordinarily requires mailing the payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. Mailing a rental payment after it is due does not constitute reasonable diligence. The postmark date of a rental payment is generally considered the date of mailing, unless there is satisfactory corroborating evidence to support the lessees' assertion that the mailing occurred at an earlier date.

A late payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessees' control which affected their actions in paying the rental fee. Unsubstantiated speculation as to errors in handling and processing the payment by the U.S. Postal Service is not evidence of extenuating circumstances which will justify the untimely rental payment.

Arthur M. Splonder, Lynn Devereaux, 79 IBLA 70 (Feb. 13, 1984)

Under 30 U.S.C. § 188(c) (1976), a lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that lack of diligence was justifiable. In the absence of such proof, a petition for reinstatement is properly denied.

Reasonable diligence ordinarily requires mailing payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. Mailing a rental payment after it is due does not constitute reasonable diligence.

Untimely payment of the annual rental may be justifiable if proximately caused by extenuating circumstances outside the lessee's control which occurred at or near the anniversary date of the lease. Being

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

away from the office on business does not establish that late rental payment was justifiable.

Anthony F. Hovey, 79 IBLA 148 (Feb. 23, 1984)

To justify failure to pay annual rental of an oil and gas lease so as to entitle appellant to reinstatement of lease pursuant to 30 U.S.C. § 188(c) (1976), the failure to make timely payment must be caused by factors beyond the control of the lessee, where the record establishes that the lessee failed to send the rental payment in a timely fashion for unexplained reasons, and then failed to discover the missed payment until nearly 1 year later, there is no justification for the failure to make timely payment which will permit reinstatement.

A lease terminated by operation of law for failure to make timely payment can be reinstated upon proof of reasonable diligence in attempting to make payment or a showing that failure to make timely payment was justifiable, or, under certain circumstances, in the case of inadvertent failure to pay. Where appellant did not offer to pay annual rental due on Sept. 1, 1982, until Aug. 24, 1983, and offered no proof of circumstances to justify nonpayment on the due date, the record fails to support the reinstatement of an oil and gas lease pursuant to any provision of 30 U.S.C. § 188 (1976) as amended.

Neither the doctrine of equitable estoppal nor substantial fairness is available to offer appellant relief where reliance upon those doctrines is predicated upon circumstances which indicate appellant merely failed to make timely payment through its own neglect. The existence of a cover letter indicating a payment was sent where it subsequently appears there was no payment attached to the letter as shown, is insufficient alone to place the burden upon the Government to either establish it did not receive payment, or alternatively, to explain why it did not notify appellant of the apparent omission of payment from its letter.

Davis Oil Co., 79 IBLA 218 (Feb. 29, 1984)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976). Under 30 U.S.C. § 188(c) (1976), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Sec. 401(d) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C.A. § 188(d) (West Supp. 1983), affords an additional opportunity to reinstate a lease terminated by operation of law where the rental was not tendered within 20 days of termination, if certain additional conditions are met. Where a lease terminates on or after enactment of sec. 401 (Jan. 12, 1983), the lessee must file a petition for reinstatement together with required back rental and royalty accruing from the date of termination, on or before 60 days from receipt of notice of termination or 15 months after termination, whichever is earlier.

Harriet C. Shaftel, 79 IBLA 228 (Feb. 29, 1984)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

A lessee seeking reinstatement of an oil and gas lease under sec. 401(d)(2)(A)(i) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C.A. § 188(d)(2)(A)(i) (West Supp. 1983), must tender in full prior to Jan. 12, 1983, the rental due for the lease sought to be reinstated.

Jerry Chapman Exploration Co., Blackbird Co., 80 IBLA 123 (Apr. 3, 1984)

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982) requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence. Neither reliance on a courtesy notice nor the complexity of the lessee's business affairs will justify a late payment.

Where a lessee files a petition for reinstatement of a terminated oil and gas lease in response to notification of his rights to petition for reinstatement under 30 U.S.C. § 188(c) (1982) and 30 U.S.C. § 188(d) and BLM denies reinstatement only on the basis of noncompliance with the former statutory provision, the case will be remanded to BLM for consideration of reinstatement under the latter provision.

Larry W. Ferguson, 81 IBLA 167 (May 31, 1984)

The holder of a noncompetitive oil and gas lease terminated by operation of law for failure to pay the annual rental timely is not entitled to reinstatement of his lease pursuant to sec. 31(c) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(c) (1982), where the late payment was mailed to BLM after the lease anniversary date and the lessee presents no evidence in support of the assertion that the reason for the late payment was illness at or near the lease anniversary date.

William F. Bradecomb, 81 IBLA 235 (June 6, 1984)

A petition for reinstatement pursuant to 30 U.S.C. § 188(c) (1982) of an oil and gas lease which has terminated by operation of law for failure to make timely payment of the annual rental will be denied where the petition is filed more than 15 days after receipt of notification of termination of the lease.

Ray Fink, 81 IBLA 381 (June 28, 1984)

The first-qualified applicant for an oil and gas lease acquires no vested right to have a lease issued to him but only a right to be preferred over other applicants if a lease is to be issued and his application may be rejected if it is determined that a previously terminated lease including the lands sought for leasing should be reinstated under sec. 4Cl of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2447, which amended sec. 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982).

Sec. 401 of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2447, amending sec. 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982), affords an additional opportunity to reinstate a lease terminated by operation of law where it is shown to the satisfaction of the Secretary that failure to timely pay the rental was inadvertent, provided certain criteria are met.

While the assignee of an oil and gas lease may not exercise any control or dominion over the lease prior to approval of the assignment, the assignee is not

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

precluded from paying the annual rental in an effort to avoid termination of the lease or to qualify the lease for reinstatement upon petition by the lessee of record.

Nola Grace Ptasynski, 82 IBLA 48 (July 11, 1984)

BLM properly denies a petition for reinstatement of a noncompetitive oil and gas lease, which terminated automatically after Jan. 12, 1983, for failure to pay the annual rental on or before the lease anniversary date, under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), where the lessee did not submit the required back rental within 60 days after receipt of a notice of termination, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2).

Kurt W. Nikat, 82 IBLA 71 (July 16, 1984)

The Secretary has no authority, under 30 U.S.C. § 188(c) (1982), to reinstate a lease terminated for failure to pay rentals timely unless payment has been made within 20 days of lease termination.

The Secretary may reinstate leases terminated on or after Jan. 12, 1983, if certain conditions are met and a petition for reinstatement plus required back rentals are filed the earlier of 60 days after lessee has received notice of termination or 15 months after lease termination. The submission of a rental check which is later dishonored by the drawee bank because of insufficient funds is neither a payment nor a tender of payment.

John F. Clifton, 82 IBLA 126 (July 24, 1984)

When the lessee fails to pay rentals on or before the anniversary date of the lease, where no oil or gas is being produced in paying quantities on the leased premises, then the lease shall automatically terminate by operation of law; however, if the full rental amount has been paid within 20 days of the lease anniversary date, and the failure was justifiable or not due to a lack of reasonable diligence, then the Secretary may reinstate the lease.

Late payment of an annual rental may be considered justifiable if the untimeliness was proximately caused by circumstances outside the lessee's control at or near the anniversary date of the lease; however, travel does not ordinarily prevent a person from making payment or arranging for others to make payment in his absence.

Neither the bulk nor the complexity of an individual or a corporate lessee's business organization constitutes adequate justification for a late payment, and the Board cannot conclude that a late payment is justified when the lessee neglects to order his business affairs so that his lease rental is paid on time.

In order to show that a late payment was not due to a lack of reasonable diligence, a lessee must ordinarily show that payment was made sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. Mailing the payment one day after it is due does not constitute reasonable diligence.

Leo M. Krenzler, 82 IBLA 205 (Aug. 20, 1984)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Reinstatement of a terminated noncompetitive oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), requires payment by the lessee of rental at the rate of $5 per acre as well as reimbursement of administrative costs (up to $500) and the cost of publishing notice in the Federal Register.

Maynard J. Bonnstetl, 82 IBLA 237 (Aug. 23, 1984)

RELINQUISHMENTS

The phrase "any legal subdivision" in 43 CFR 3108.1 permitting relinquishment of an oil and gas lease or any legal subdivision thereof is not limited in meaning to whole sections for lands shown on a protracted survey.

James R. Chudnow, 82 IBLA 262 (Aug. 29, 1984)

RENTALS

An oil and gas lease offer is properly rejected where the offer is deficient in the first year's rental by more than 10 percent.

Pursuant to 43 CFR 3130.2-1, rentals are not properly prorated for any lands in which the United States owns an undivided fractional interest, but shall be payable at the same rate as provided for the full acreage in such lands.

A noncompetitive oil and gas lease offer filed "over-the-counter" is properly rejected when the accompanying rental payment is deficient by more than 10 percent. However, in appropriate circumstances, if the balance of the rental is paid prior to rejection by BLM and there are no intervening rights of third parties, the offer may be reinstated with priority from the date the deficiency is corrected.

Joe R. Johnson, 78 IBLA 382 (Jan. 31, 1984)

BLM must reject a noncompetitive over-the-counter oil and gas lease offer filed pursuant to sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976), to the extent that the land has been patented with no mineral reservation to the United States and in its entirety where the land cannot be embraced within a 6-mile square area or an area not exceeding six surveyed sections in length and width and the first year's advance rental is deficient by more than 10 percent.

James R. Chudnow, John L. Messinger, 79 IBLA 1 (Feb. 2, 1984)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976). Under 30 U.S.C. § 188(c) (1976), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment

OIL AND GAS LEASES--Continued

RENTALS--Continued

is not tendered at the proper office within 20 days after the due date.

Harriet C. Shaffel, 79 IBLA 228 (Feb. 29, 1984)

An applicant receiving priority in a drawing of simultaneously filed oil and gas lease applications who fails to submit the payment of the proper amount of advance rental within 30 days after receipt of a notice that payment is due, as prescribed by 43 CFR 3112.4-1(a), is automatically disqualified to receive a lease.

B. W. Jones, 79 IBLA 295 (Mar. 20, 1984)

When, pursuant to 43 CFR 3112.4-1, BLM sends notice by certified mail to a simultaneous oil and gas applicant at the address of record that the executed lease agreement and rental must be returned to BLM within 30 days of receipt, and the notice is returned to BLM marked "UNCLAIMED" by the Postal Service, and where nondelivery did not occur as a result of negligence of the Postal Service, the applicant is considered to have been served at the time BLM receives the returned, undelivered certified letter, such constructive service being equivalent in legal effect to actual service of the notice. A tender of the lease agreement by the applicant more than 30 days subsequent to the date of constructive delivery is properly rejected.

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision, since the individual is properly charged with knowledge of the true facts.

Tom Hurd, 80 IBLA 107 (Apr. 3, 1984)

Where, following a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit the executed lease agreement and advance rental within 30 days of receipt of notice, the application is properly rejected.

Paul C. Peters, 80 IBLA 121 (Apr. 3, 1984)

A lessee seeking reinstatement of an oil and gas lease under sec. 401(d)(2)(A)(i) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C.A. § 188(d)(2)(A)(i) (West Supp. 1983), must tender in full prior to Jan. 12, 1983, the rental due for the lease sought to be reinstated.

Jerry Chambers Exploration Co., Blackbird Co., 80 IBLA 123 (Apr. 3, 1984)

A simultaneous oil and gas lease application is properly rejected where the executed lease forms are not received by the proper BLM office within 30 days from receipt of notice of rental due.

P. A. Rapp, 80 IBLA 133 (Apr. 6, 1984)

OIL AND GAS LEASES--Continued

RENTALS--Continued

Where, in a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit his first year's advance rental payment within 30 days after receipt of notice, as prescribed by 43 CFR 3112.4-1(a) (1982), his lease offer must be rejected.

Where there is no evidence of receipt of a check in payment of the first year's advance rental pursuant to 43 CFR 3112.4-1(a) (1982), the presumption that BLM employees have properly discharged their duties and not lost or misplaced the check is not overcome by an affidavit executed by applicant which states that the check was enclosed in the same envelope with other documents received by BLM, which affidavit includes a copy of applicant's personal checkbook register showing a check was issued to BLM.

S. H. Partners, 80 IBLA 153 (Apr. 9, 1984)

Where, following the drawing of a simultaneously filed oil and gas lease drawing entry card, a priority applicant fails to submit advance rental within 30 days from the date of receipt of notice that payment is due, disqualification of the offer is automatic.

Judith A. Lawton, 80 IBLA 198 (Apr. 24, 1984)

Where the Minerals Management Service determines part of a noncompetitive oil and gas lease issued in 1971 to be within an undefined known geologic structure, a decision to increase rental to $2 per acre is erroneous where the record shows the lease is committed to an approved unit plan with a well capable of production, with a general provision for allocation of production but all the lease acreage is outside the participating area. An increase of rental rate is not appropriate for such a lease where the terms of the lease specifically direct that the rental rate remain at $0.50 per acre.

Dyco Petroleum Corp., 81 IBLA 65 (May 22, 1984)

Where an oil and gas lease offeror properly receives notice of his priority, and notice of the requirements that the rental payment must be paid and that the lease must be executed within 30 days, the failure to make the rental payment and execute the lease within the 30-day period will result in rejection of the application. The offeror's absence from his address of record when the notice was received at his address will not excuse noncompliance with 43 CFR 3112.4-1.

Eloanne Ervin, 81 IBLA 100 (May 29, 1984)

Where BLM mails a notice to a first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to submit a lease offer and tender the first year's rental in accordance with 43 CFR 3112.4-1(a), the applicant will be deemed to have received the notice if it was sent to the applicant's last address of record, regardless of whether it was in fact received by him. However, when a letter is returned to BLM as undeliverable, BLM should examine the case record to see if it contains an updated address. If an updated address would be found upon proper examination, the notice must be sent to the new address to effect service.

Stephen C. Ritchie, 81 IBLA 162 (May 31, 1984)

OIL AND GAS LEASES--Continued

RENTALS--Continued

Where, in a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit his executed lease agreement and first year's advance rental payment within 10 days after receipt of notice to do so, as prescribed by 43 CFR 3112.6-1(a), his lease application must be rejected.

Fred William Gerger, 81 IBLA 344 (June 25, 1984)

While the assignee of an oil and gas lease may not exercise any control or dominion over the lease prior to approval of the assignment, the assignee is not precluded from paying the annual rental in an effort to avoid termination of the lease or to qualify the lease for reinstatement upon petition by the lessee of record.

Nola Grace Piasynski, 82 IBLA 48 (July 11, 1984)

Where the Minerals Management Service determines part of noncompetitive oil and gas leases issued in 1971 and 1972 to be within an undefined known geologic structure, a decision to increase rental for all acreage to $2 per acre is erroneous where the record shows the lease is committed to an approved unit plan with a well capable of production and a general provision for allocation of production. Where the terms of the leases specifically direct that the rental rate remain at $0.50 per acre for acreage outside a participating area, an increased rental rate is not appropriate for that acreage.

Picoance Partners, 82 IBLA 101 (July 24, 1984)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Maynard J. Bonesteel, 82 IBLA 237 (Aug. 23, 1984)

Where BLM has determined that any part of the lands described in a noncompetitive oil and gas lease is within an undefined known geologic structure, the lessee is required to pay increased rental in accordance with 43 CFR 3103.3-2(b)(1) (1982).

Livingston & Courdin Exploration, Inc., 82 IBLA 336 (Sept. 12, 1984)

Where, after a drawing of simultaneously filed oil and gas lease applications, the authorized officer mails a notice to the successful drawee informing him of his priority and the requirement that the advance rental must be paid within the allotted time, which letter is received at his address of record, his subsequent failure to remit the rental timely will disqualify his application even though he asserts that the person who received and signed for the notice was not his designated agent for receipt of mail.

After a drawing of simultaneously filed oil and gas lease applications the requirement that the first year's rental be received in the proper office within

OIL AND GAS LEASES--Continued

RENTALS--Continued

the allotted time after notice to the applicant is mandatory, and consideration of excuses for failure to comply is not permitted.

Daniel Pia, 83 IBLA 47 (Sept. 24, 1984)

A noncompetitive oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law upon failure of a lessee to pay rental on or before the anniversary date of the lease. If deficient payment has been made on or before the anniversary date but the deficiency is nominal, the lease does not terminate unless the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency. Departmental regulation 43 CFR 3108.2-1(b), 48 FR 33673 (July 22, 1983), provides that a deficiency shall be considered nominal if it is not more than $100 or more than 5 percent of the total payment due, whichever is less. Absent an affirmative billing error by BLM, an oil and gas lessee is not entitled to a notice of deficiency and an opportunity to correct it unless the deficiency is nominal.

Louise V. Lee, 83 IBLA 50 (Sept. 24, 1984)

STIPULATIONS

The Secretary of the Interior may require an oil and gas lease offeror to accept stipulations reasonably designed to protect environmental and other land use values as a condition precedent to the issuance of a lease for land located in a national forest. Where on appeal an offeror registers objections concerning such stipulations, and the Forest Service subsequently clarifies the nature of the stipulations and the offeror raises no further compliants, the imposition of the stipulation will be upheld.

James N. Chudnow, Laurent A. Giesbert, 78 IBLA 317 (Jan. 24, 1984)

Where a competitive oil and gas lease imposes additional stipulations without prior notice to the offeror, the offeror may accept or reject the lease containing the additional stipulations. The imposition of additional stipulations without notice to the offeror defers the 15-day period in 43 CFR 3132.5(a) until the offeror has notice of the stipulations to be included in the lease.

Texaco U.S.A., et al., 82 IBLA 61 (July 11, 1984)

Shell Oil Co. et al., 83 IBLA 22 (Sept. 21, 1984)

SUSPENSIONS

Where application is made for suspension of unitized oil and gas leases in order to preserve them from expiration pending approval of an application for permission to drill, and where the suspension is granted at the discretion of the authorized officer on condition that permission to drill may be denied upon a finding that drilling operations would result in unacceptable impacts on the wilderness characteristics of the area, an environmental impact statement on the effects of such drilling which fails to consider the alternative of refusing permission to drill is an inadequate basis for a decision to permit drilling.

Sierra Club et al. (On Judicial Remand), 80 IBLA 251 (May 2, 1984)

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

An oil and gas lease expires upon the running of its primary term unless eligible for extension as provided by 43 CFR Subpart 3701. While a request for suspension of a lease may be retroactively approved after the lease has expired, no suspension application may be approved where the application itself is not filed until after the expiration date of the lease, unless it can be found that actions of the Department have constituted a de facto suspension of the lease during its term.

William C. Kirkwood, 81 IBLA 204 (June 1, 1984)

TERMINATION

Under 30 U.S.C. § 188(c) (1976), a lease terminated automatically for untimely payment of annual rental may be reinstated where the rental is paid within 20 days and upon receipt of a petition for reinstatement showing that reasonable diligence was exercised or that the failure to make timely payment was justifiable. In the absence of such proof, the petition for reinstatement is properly denied.

Reasonable diligence ordinarily requires mailing the payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. Mailing a rental payment after it is due does not constitute reasonable diligence. The postmark date of a rental payment is generally considered the date of mailing, unless there is satisfactory corroborating evidence to support the lessees' assertion that the mailing occurred at an earlier date.

A late payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessees' control which affected their actions in paying the rental fee. Unsubstantiated speculation as to errors in handling and processing the payment by the U.S. Postal Service is not evidence of extenuating circumstances which will justify the untimely rental payment.

Arthur M. Solender, Lynn Devereaux, 79 IBLA 70 (Feb. 13, 1984)

Under 30 U.S.C. § 188(c) (1976), a lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that lack of diligence was justifiable. In the absence of such proof, a petition for reinstatement is properly denied.

Reasonable diligence ordinarily requires mailing payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. Mailing a rental payment after it is due does not constitute reasonable diligence.

Untimely payment of the annual rental may be justifiable if proximately caused by extenuating circumstances outside the lessee's control which occurred at or near the anniversary date of the lease. Being away from the office on business does not establish that late rental payment was justifiable.

Anthony E. Hoyer, 79 IBLA 148 (Feb. 23, 1984)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

To justify failure to pay annual rental of an oil and gas lease so as to entitle appellant to reinstatement of lease pursuant to 30 U.S.C. § 188(c) (1976), the failure to make timely payment must be caused by factors beyond the control of the lessee. Where the record establishes that the lessee failed to send the rental payment in a timely fashion for unexplained reasons, and then failed to discover the missed payment until nearly 1 year later, there is no justification for the failure to make timely payment which will persit reinstatement.

A lease terminated by operation of law for failure to make timely payment can be reinstated upon proof of reasonable diligence in attempting to make payment or a showing that failure to make timely payment was justifiable, or, under certain circumstances, in the case of inadvertent failure to pay. Where appellant did not offer to pay annual rental due on Sept. 1, 1982, until Aug. 24, 1983, and offered no proof of circumstances to justify nonpayment on the due date, the record fails to support the reinstatement of an oil and gas lease pursuant to any provision of 30 U.S.C. § 188 (1976) as amended.

Davis Oil Co., 79 IBLA 218 (Feb. 29, 1984)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976). Under 30 U.S.C. § 188(c) (1976), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Sec. 401(d) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C.A. § 188(d) (West Supp. 1983), affords an additional opportunity to reinstate a lease terminated by operation of law where the rental was not tendered within 20 days of termination, if certain additional conditions are met. Where a lease terminates on or after enactment of sec. 401 (Jan. 12, 1983), the lessee must file a petition for reinstatement together with required back rental and royalty accruing from the date of termination, on or before 60 days from receipt of notice of termination or 15 months after termination, whichever is earlier.

Harriet C. Shaftel, 79 IBLA 228 (Feb. 29, 1984)

A lessee seeking reinstatement of an oil and gas lease under sec. 401(d)(2)(A)(i) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C.A. § 188(d)(2)(A)(i) (West Supp. 1983), must tender in full prior to Jan. 12, 1984, the rental due for the lease sought to be reinstated.

Jerry Chambers Exploration Co., Blackbird Co., 80 IBLA 123 (Apr. 3, 1984)

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the lands in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for as long as committed provided that production is obtained within the unit prior to expiration of the term of the lease. Upon commitment and segregation of the nonproducing portion of a producing oil and gas lease prior to expiration of its primary term or its extended term (other than by production), production

OIL AND GAS LEASES--Continued

TERMINATION--Continued

on the nonunitized portion of the lease will not serve to extend the unitized portion.

Conoco, Inc., 80 IBLA 161 (Apr. 11, 1984) 91 I.D. 181

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982) requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence. Neither reliance on a courtesy notice nor the complexity of the lessee's business affairs will justify a late payment.

Where a lessee files a petition for reinstatement of a terminated oil and gas lease in response to notification of his rights to petition for reinstatement under 30 U.S.C. § 188(c) (1982) and 30 U.S.C. § 188(d) and BLM denies reinstatement only on the basis of noncompliance with the former statutory provision, the case will be remanded to BLM for consideration of reinstatement under the latter provision.

Larry W. Ferguson, 81 IBLA 167 (May 31, 1984)

The holder of a noncompetitive oil and gas lease terminated by operation of law for failure to pay the annual rental timely is not entitled to reinstatement of his lease pursuant to sec. 31(c) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(c) (1982), where the late payment was mailed to BLM after the lease anniversary date and the lessee presents no evidence in support of the assertion that the reason for the late payment was illness at or near the lease anniversary date.

William F. Branscome, 81 IBLA 235 (June 6, 1984)

A petition for reinstatement pursuant to 30 U.S.C. § 188(c) (1982) of an oil and gas lease which has terminated by operation of law for failure to make timely payment of the annual rental will be denied where the petition is filed more than 15 days after receipt of notification of termination of the lease.

Kay Fink, 81 IBLA 381 (June 28, 1984)

The first-qualified applicant for an oil and gas lease acquires no vested right to have a lease issued to him but only a right to be preferred over other applicants if a lease is to be issued and his application may be rejected if it is determined that a previously terminated lease including the lands sought for leasing should be reinstated under sec. 401 of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2447, which amended sec. 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982).

Sec. 401 of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2447, amending sec. 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982), affords an additional opportunity to reinstate a lease terminated by operation of law where it is shown to the satisfaction of the Secretary that failure to timely pay the rental was inadvertent, provided certain criteria are met.

While the assignee of an oil and gas lease may not exercise any control or dominion over the lease prior to approval of the assignment, the assignee is not precluded from paying the annual rental in an effort to

OIL AND GAS LEASES--Continued

TERMINATION--Continued

avoid termination of the lease or to qualify the lease for reinstatement upon petition by the lessee of record.

Nola Grace Ptasynski, 82 IBLA 48 (July 11, 1984)

The Secretary has no authority, under 30 U.S.C. § 188(c) (1982), to reinstate a lease terminated for failure to pay rentals timely unless payment has been made within 20 days of lease termination.

The Secretary may reinstate leases terminated on or after Jan. 12, 1983, if certain conditions are met and a petition for reinstatement plus required back rentals are filed the earlier of 60 days after lessee has received notice of termination or 15 months after lease termination. The submission of a rental check which is later dishonored by the drawee bank because of insufficient funds is neither a payment nor a tender of payment.

John F. Clifton, 82 IBLA 126 (July 24, 1984)

When the lessee fails to pay rentals on or before the anniversary date of the lease, where no oil or gas is being produced in paying quantities on the leased premises, then the lease shall automatically terminate by operation of law; however, if the full rental amount has been paid within 20 days of the lease anniversary date, and the failure was justifiable or not due to a lack of reasonable diligence, then the Secretary may reinstate the lease.

Leo M. Krenzler, 82 IBLA 205 (Aug. 20, 1984)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Reinstatement of a terminated noncompetitive oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), requires payment by the lessee of rental at the rate of $5 per acre as well as reimbursement of administrative costs (up to $500) and the cost of publishing notice in the Federal Register.

Maynard J. Bonesteel, 82 IBLA 237 (Aug. 23, 1984)

A noncompetitive oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law upon failure of a lessee to pay rental on or before the anniversary date of the lease. If deficient payment has been made on or before the anniversary date but the deficiency is nominal, the lease does not terminate unless the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency. Departmental regulation 43 CFR 3108.2-1(b), 48 FR 33673 (July 22, 1983), provides that a deficiency shall be considered nominal if it is not more than $100 or more than 5 percent of the total payment due, whichever is less. Absent an affirmative billing error by BLM, an oil and gas lessee is not entitled to a notice of deficiency and an opportunity to correct it unless the deficiency is nominal.

Louise V. Lee, 83 IBLA 50 (Sept. 24, 1984)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the lands in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for as long as committed provided that production is obtained within the unit prior to expiration of the term of the lease. Upon commitment and segregation of the nonproducing portion of a producing oil and gas lease prior to expiration of its primary term or its extended term (other than by production), production on the nonunitized portion of the lease will not serve to extend the unitized portion.

Conoco, Inc., 80 IBLA 161 (Apr. 11, 1984) 91 I.D. 181

Where the Minerals Management Service determines part of noncompetitive oil and gas leases issued in 1971 and 1972 to be within an undefined known geologic structure, a decision to increase rental for all acreage to $2 per acre is erroneous where the record shows the lease is committed to an approved unit plan with a well capable of production and a general provision for allocation of production. Where the terms of the leases specifically direct that the rental rate remain at $0.50 per acre for acreage outside a participating area, an increased rental rate is not appropriate for that acreage.

Pizenance Partners, 82 IBLA 101 (July 24, 1984)

A finding that an oil and gas lease has expired for failure of one of several lessees of record to execute a joinder to a unit agreement for a producing unit will be set aside, in the absence of intervening rights in the leasehold, where a substantial allegation is made that an assignment of record was intended by the parties to convey all the interest of that lessee to an assignee who timely executed a joinder to the unit agreement.

Monsanto Co., 82 IBLA 108 (July 24, 1984)

Where a unit operator seeks to include certain acreage in a unit, BLM may properly declare the acreage not committed if all working interests have not been committed; however, such a determination will be set aside where on appeal BLM expresses its willingness to consider the acreage partially committed.

Coors Energy Co., 82 IBLA 212 (Aug. 22, 1984)

OIL SHALE

WITHDRAWALS

A placer mining claim located for gold on land previously withdrawn from appropriation under the mining laws relating to metalliferous minerals by Public Land Order No. 4522, dated Sept. 11, 1968, is null and void ab initio.

Charles H. Phillips, 78 IBLA 320 (Jan. 24, 1984)

Mining claims located for trace minerals on land previously withdrawn from mineral entry by Exec. Order No. 5327, as to nonmetalliferous minerals, and Public Land Order No. 4522, as to metalliferous

OIL SHALE--Continued

WITHDRAWALS--Continued

minerals, are properly declared null and void ab initio.

Mineral Life Corp., 81 IBLA 103 (May 30, 1984)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

TIMBER SALES

A BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed in the absence of a showing that the decision is clearly in error.

An appellant who levels specific criticisms of a BLM decision to proceed with a timber sale in an attempt to overturn the sale as being poorly planned and ill-conceived cannot prevail where the record shows that BLM complied with applicable law and procedures in offering the tract for sale and where many of the concerns and criticisms amount to mere expressions of disagreement with BLM's conclusions. An appellant's judgment cannot be substituted for that of BLM on the basis of arguable differences of opinion.

Robert C. Salisbury, 79 IBLA 370 (Mar. 26, 1984)

A decision by BLM denying a protest to a proposed timber sale will be affirmed where the appellant does not present sufficient evidence that the sale area was misclassified as high-intensity land.

Where BLM removes concentrated unplantable zones from the area of a proposed timber sale, that area is not misclassified as high-intensity land even though small unplantable zones are interspersed throughout it.

In re Chapman-Keeler Timber Sale, 80 IBLA 237 (Apr. 30, 1984)

A decision by BLM denying a protest to a proposed timber sale will be affirmed where the appellant does not present sufficient evidence that the sale area was misclassified as high-intensity land.

BLM may deviate from provisions contained in an environmental impact statement with respect to regeneration cutting in a planned timber sale where the deviation is not so significant as to require preparation of a supplemental environmental impact statement.

BLM may properly proceed with a proposed timber sale where the environmental assessment of the sale considered all relevant factors, including the impact of road construction on soil erosion, wildlife and recreational resources.

In re Bald Point Timber Sale, 80 IBLA 304 (May 4, 1984)

In reviewing a denial by the BLM of a protest of a timber sale on lands managed pursuant to the Act of Aug. 28, 1937 (O & C Act), 43 U.S.C. § 1181a (1982), on the issue of violation of the principle of "sustained yield," the Board will defer to BLM's judgment in the absence of a clear showing of failure to consider critical factors or that the timber sale is not supported by the administrative record.

In determining regeneration for purposes of high-intensity timber management land, the term "stocked" referring to the number of suitable trees per acre is properly distinguished from "established" referring to

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS--Continued

TIMBER SALES--Continued

a stand of suitable growing trees which have survived at least one growing season.

In re Thompson Creek Timber Sale, 81 IBLA 242 (June 7, 1984)

A party challenging a decision to harvest timber on the grounds that clearcutting is an inappropriate method to be employed and that pertinent environmental considerations were disregarded bears the burden of establishing both the factual predicates and the ultimate conclusions.

Where the record reflects that the BLM decision not to do class III onsite cultural resource studies on the timber sale units was made without the consultation process as required by 36 CFR 800.4(a)(1), BLM will be required to so consult and to take whatever further action is required as a result of the consultation process prior to any entry by the timber purchaser.

Curtis Mitchell & STAND, 82 IBLA 275 (Aug. 31, 1984)

OUTER CONTINENTAL SHELF LANDS ACT

GENERALLY

Under the civil penalty provision of sec. 24(b) of the Outer Continental Shelf Lands Act, notice of a violation and failure to correct the violation within such reasonable period of time as may be allowed is a prerequisite to liability.

Conoco, Inc., 78 IBLA 192 (Jan. 5, 1984)

GEOLOGICAL AND GEOPHYSICAL EXPLORATION

Generally

Under 30 CFR 251.6-3(d), the Director of the Minerals Management Service will require republication of an exploratory test drilling application and a period for other persons to join in a venture as original participants without penalty where the applicant proposes changes to the original application and the Director determines that those changes are significant. Deepening of a test well in an attempt to achieve the recognized goal of penetrating a particular geological zone was an anticipated event which was properly determined not to be significant within the meaning of 30 CFR 251.6-3(d).

Shell Oil Co., 80 IBLA 184 (Apr. 20, 1984)

PATENTS OF PUBLIC LANDS

GENERALLY

A patent of land issued by the proper officers of the United States is presumed valid, and to pass title.

Henry J. Hudspeth, Sr., Betty A. Hudspeth, 78 IBLA 235 (Jan. 9, 1984)

PATENTS OF PUBLIC LANDS--Continued

GENERALLY--Continued

A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to the course or distance or the quantity of land stated to be conveyed.

Elmer L. Lowe, 80 IBLA 101 (Apr. 3, 1984)

A patentee's transfer of property, or use of property, for a purpose other than the one described in a patent under the Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 to 869-4 (1976), without consent of the Department of the Interior, triggers reversion of the land to the United States; however, such reversion occurs only after due notice and an opportunity for a hearing has been provided to the patentee.

George Schultz et al., 81 IBLA 29 (May 17, 1984)

AMENDMENTS

Where a stranger to the original patentee acquires a certain, specific tract of land through mesne conveyances and then seeks to have the patent amended so that he can acquire other land instead, he must demonstrate first that there was an error in the patent's land description and, second, that he is deserving as a matter of equity and justice to be granted that which was actually earned by the original patentee.

George Val Snow (On Judicial Remand), 79 IBLA 261 (Mar. 7, 1984)

Under sec. 316 of the Federal Land Policy and Management Act of 1976, the Secretary of the Interior has discretionary authority to correct an error in a conveyance document when the error is clearly established and equitable considerations dictate that relief be granted. BLM's rejection of an application to amend a homestead patent to include additional acreage will be affirmed where the record does not support a finding that the original patentees had entered those lands, nor was there ever any intent to enter such lands as part of the original homestead entry.

Elmer L. Lowe, 80 IBLA 101 (Apr. 3, 1984)

EFFECT

The effect of issuance of legal patent is to transfer title from the United States and to remove the lands from the jurisdiction of the Department of the Interior. When patent has been issued the Department of the Interior can exercise no further control over the lands and relief must be sought through the courts.

A patent of land issued by the proper officers of the United States is presumed valid, and to pass title.

Where a patent has been issued for the lands on which a claim is situated it is proper for BLM to refuse recordation of the claim, since it has no jurisdiction over the claim.

Henry J. Hudspeth, Sr., Betty A. Hudspeth, 78 IBLA 235 (Jan. 9, 1984)

PATENTS OF PUBLIC LANDS--Continued

EFFECT--Continued

The Department of the Interior loses jurisdiction over public land once it has been patented. Upon issuance of patent, jurisdiction to adjudicate interests in the land conveyed is lost and an appeal by a party asserting conflicting rights in the land is properly dismissed as moot.

Goodnews Bay Mining Co. et al., 81 IBLA 1 (May 14, 1984)

The effect of the issuance of a legal patent is to transfer legal title from the United States and remove the land from jurisdiction of the Department of the Interior. Applications for land, title to which has passed from the United States by issuance of a legal patent, must be rejected.

James & Gloria Eldorado, 82 IBLA 9 (July 2, 1984)

RESERVATIONS

Where lands were patented to a railroad under a statute which authorized the granting of nonmineral lands only, the issuance of the patent generally constituted a conclusive determination by the United States of the nonmineral character of the land so patented, and the subsequent discovery of mineral values thereon does not operate to void the conveyance by the United States. Where such land has been reconveyed to the United States subject to a reservation of all minerals to the private grantor, the land is not subject to the subsequent location of mining claims under the general mining laws.

Moise & Leon Borger, 82 IBLA 253 (Aug. 28, 1984)

Effect must be given, if possible, to every word, clause, and sentence in a statute. Therefore, the application of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(f) (1982), to mineral patent must be made in a manner which recognizes valid existing rights of a mineral claimant at the time of passage of the Act.

California Portland Cement Corp., 83 IBLA 11 (Sept. 18, 1984)

SUITS TO CANCEL

The effect of issuance of legal patent is to transfer title from the United States and to remove the lands from the jurisdiction of the Department of the Interior. When patent has been issued the Department of the Interior can exercise no further control over the lands and relief must be sought through the courts.

Henry J. Hudspeth, Sr., Betty A. Hudspeth, 78 IBLA 235 (Jan. 9, 1984)

PAYMENTS

GENERALLY

The Secretary may reinstate leases terminated on or after Jan. 12, 1983, if certain conditions are met and a petition for reinstatement plus required back rentals are filed the earlier of 60 days after lessee has received notice of termination or 15 months after lease termination. The submission of a rental check which is later dishonored by the drawee bank because

PAYMENTS--Continued

GENERALLY--Continued

of insufficient funds is neither a payment nor a tender of payment.

John F. Clifton, 82 IBLA 126 (July 24, 1984)

PHOSPHATE LEASES AND PERMITS

PERMITS

The filing of a phosphate prospecting permit application creates no vested rights in the applicant and the application must be rejected if the land described therein is determined by Geological Survey to be within a known phosphate leasing area and to be subject to the competitive leasing provisions of the Mineral Leasing Act. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying phosphate bed, which finding requires competitive leasing of the land.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

Extension of a prospecting permit may be properly denied where application is not timely filed and no showings are made, as required by 43 CFR 3511.3-2, as to the reasons why additional time is needed to complete prospecting work.

Inverness Mining Co., 81 IBLA 78 (May 23, 1984)

BLM must reject a phosphate prospecting permit application filed pursuant to sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982), where the land is determined to be within a known phosphate leasing area.

An applicant for a phosphate prospecting permit under sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982), acquires no vested right to a permit by virtue of an inordinate delay in adjudication of the application, even where a permit might have issued when the application was originally filed.

In rejecting a phosphate prospecting permit application because the land is within a known phosphate leasing area, and thus no longer subject to issuance of a permit, BLM may rely on proof of the existence or workability of minerals in adjacent lands and geological and other surrounding external conditions, and need not engage in drilling or other exploratory work on the ground.

In rejecting a phosphate prospecting permit application, BLM may properly consider a recommendation of the Forest Service that issuance of a permit would not be in the public interest. However, ultimate rejection must be supported by facts of record and a reasoned explanation.

Elizabeth B. Archer et al., 82 IBLA 14 (July 5, 1984)

POWERSITE LANDS

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a power project is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1976), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

J. W. Roberts, Jean Roberts, 79 IBLA 279 (Mar. 16, 1984)

POSSESSIVE LANDS--Continued

Where Congress has provided in 16 U.S.C. § 818 (1982) that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to sec. 16 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1615 (1976), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

Federal land occupied by a municipally operated utility pursuant to a license from the Federal Power Commission may be conveyed to a Native corporation selecting such land, subject to such license. Lands occupied by the utility are not excluded from the interim conveyance describing them.

Ketchikan Public Utilities, 79 IBLA 286 (Mar. 20, 1984)

PRACTICE BEFORE THE DEPARTMENT

PERSONS QUALIFIED TO PRACTICE

Qualifications to practice before the Department of the Interior are prescribed by regulations. Where an appeal is brought by an individual who does not appear to fall within any of the categories of persons authorized to practice, the appeal is subject to dismissal.

Robert W. Caldwell, 79 IBLA 141 (Feb. 22, 1984)

When an Indian tribe or member of an Indian tribe appears before the Board of Indian Appeals represented by a person not qualified to appear before the Department of the Interior under 43 CFR 4.1, the party will be informed that the unqualified person may not appear, but will not be penalized for choosing an unqualified representative. Once informed that the chosen representative is unqualified, the Indian party must choose a qualified representative or appear pro se in order for filings to be accepted.

Estate of Benjamin Kent, Sr. (Rep. Wawanowat), 13 IBIA 21 (Aug. 29, 1984)

PRIVATE EXCHANGES

GENERALLY

While there is no Departmental policy absolutely forbidding multiparty exchanges under sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1976), no such exchange can be approved unless the land ultimately acquired by the United States benefits a Federal natural resource management program.

Harry W. Bailey, 79 IBLA 362 (Mar. 23, 1984)

PUBLIC INTEREST

The fact that land sought in a private exchange is within a known geothermal resource area and is actually under lease is normally sufficient to support a finding that the land sought by the private party is more valuable for public purposes than the land which is being exchanged.

Harry W. Bailey, 79 IBLA 362 (Mar. 23, 1984)

PUBLIC LANDS

GENERALLY

The term "public lands," often used synonymously with "public domain," generally refers to lands which are open and available for various forms of disposition or disposal to the general public and state or local governments.

State Selections of Onshore Lands Underlying Navigable Waters in the Geographic Area of Revoked Public Land Order 82, M-36949 (Aug. 22, 1983) 91 I.D. 67

ALASKA

Under sec. 6(b) of the Alaska Statehood Act, the term "public lands" means those lands in Federal ownership that are not withdrawn or otherwise reserved.

State Selections of Onshore Lands Underlying Navigable Waters in the Geographic Area of Revoked Public Land Order 82, M-36949 (Aug. 22, 1983) 91 I.D. 67

APPRAISALS

Where BLM appraises a parcel of land subject to a communication site right-of-way for direct sale to the holder of the grant pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), it is proper for BLM to appraise the parcel as if unencumbered, since the right-of-way is extinguished upon the right-of-way holder's acquisition of the fee title.

Cole Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

CLASSIFICATION

Lands segregated on the public records by a Recreational and Public Purposes lease are not available for the location of mining claims, but a claimant may establish the exterior boundaries of a lode claim on land under a Recreation and Public Purposes lease, with the permission of the lessee, for the purpose of making end lines parallel so as to obtain extralateral rights to a vein or lode discovered on lands available for location.

Santa Fe Mining, Inc., 79 IBLA 48 (Feb. 9, 1984)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Western Nuclear, Inc., 82 IBLA 67 (July 12, 1984)

JURISDICTION OVER

The Act of May 23, 1908, 35 Stat. 267, as amended, 16 U.S.C. § 671 (1976), providing for the establishment of the National Bison Range, terminated the status of the land included therein as land reserved for Indian use.

Hingeline Overthrust Oil & Gas, Inc., 80 IBLA 4 (Mar. 27, 1984)

PUBLIC LANDS--Continued

JURISDICTION OVER--Continued

BLM has the jurisdiction to determine whether the terms of a mineral reservation in a deed to the United States has operated to vest title to the mineral estate in the United States by virtue of a failure to comply with an annual production requirement found in the reservation. However, where the record indicates that BLM has not fully considered whether production within a production unit which includes the reserved land serves to extend the reservation, the case will be remanded to BLM for consideration of that question.

Doris A. Slaaten et al., 81 IBLA 282 (June 12, 1984)

RIPARIAN RIGHTS

Generally, the meander line of a river is not to be treated as a boundary and when the United States conveys a tract of land by patent referring to an official plat which shows the tract to be riparian to a river, the patent conveys all the rights to the water line of that river, if navigable, or to the center of the stream if nonnavigable, except where there is fraud, gross error shown in the survey, or an intention to limit a grant or conveyance to the actual meander lines as disclosed in the facts or circumstances.

Donald W. Hoak, 81 IBLA 74 (May 23, 1984)

Where riparian public land has been completely eroded away by the actions of a navigable river, title is lost to the United States and, where said land is subsequently restored through accretion by the continued action of the river, title belongs to the riparian owner.

David A. Provinse, 81 IBLA 148 (May 31, 1984)

It is a general rule that a meander line is not a line of boundary but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the waterline itself. The "Bagart exception" to this rule is that if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within the meander line. In determining the applicability of the "Bagart exception," consideration must also be given to equitable factors, including unjust enrichment.

Eldin L. R. Johnson, Marilyn Johnson, 82 IBLA 135 (July 27, 1984)

PUBLIC SALES

APPRAISALS

Where BLM appraises a parcel of land subject to a communication site right-of-way for direct sale to the holder of the grant pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), it is proper for BLM to appraise the parcel as if unencumbered, since the right-of-way is extinguished upon the right-of-way holder's acquisition of the fee title.

Cole Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

RAILROAD GRANT LANDS

Where lands were patented to a railroad under a statute which authorized the granting of nonmineral lands only, the issuance of the patent generally constituted a conclusive determination by the United States of the nonmineral character of the land so patented, and the subsequent discovery of mineral values thereon does not operate to void the conveyance by the United States. Where such land has been reconveyed to the United States subject to a reservation of all minerals to the private grantor, the land is not subject to the subsequent location of mining claims under the general mining laws.

Moise & Leon Berger, 82 IBLA 253 (Aug. 28, 1984)

RECLAMATION LANDS

RIGHTS-OF-WAY

Where a reclamation withdrawal is modified by public land order to authorize a public highway right-of-way pursuant to sec. 8 of the Act of July 26, 1866 (repealed 1976, formerly codified at 43 U.S.C. § 932), the nature and extent of the rights authorized are controlled by the express terms of the public land order restoring the land. A decision to close a road built on a right-of-way within a reclamation withdrawal which is expressly conditioned upon noninterference with the operation and maintenance of a dam and related facilities will be affirmed where the record supports a determination by reclamation officials that public access is substantially interfering with operations and maintenance and the road has been replaced by a new highway open to the public.

A state retains extensive jurisdiction over Federal lands within its boundary, but Congress is authorized to enact legislation regarding the use and occupancy of the Federal lands. Provisions of state law regarding abandonment of a right-of-way within a reclamation withdrawal must recede where implementation thereof would interfere with the effort of reclamation officials to operate and maintain reclamation facilities as directed by Act of Congress.

County of Imperial, 5 OHA 286 (Mar. 16, 1984)

RECREATION AND PUBLIC PURPOSES ACT

A mining claim lying entirely on lands previously patented under the Recreation and Public Purposes Act is null and void ab initio because such lands are not open to mineral entry.

Cruz G. Velasquez, Armando Sanchez, 78 IBLA 355 (Jan. 25, 1984)

Lands segregated on the public records by a Recreational and Public Purposes lease are not available for the location of mining claims, but a claimant may establish the exterior boundaries of a lode claim on land under a Recreation and Public Purposes lease, with the permission of the lessee, for the purpose of making end lines parallel so as to obtain extralateral rights to a vein or lode discovered on lands available for location.

Santa Fe Mining, Inc., 79 IBLA 48 (Feb. 9, 1984)

RECREATION AND PUBLIC PURPOSES ACT--Continued

The Recreation and Public Purposes Act makes reserved minerals subject to disposition only under applicable laws and such regulations as the Secretary may prescribe. In the absence of such regulations, land under patent pursuant to the Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 - 869-4 (1976), is not open to location under the mining laws.

A patentee's transfer of property, or use of property, for a purpose other than the one described in a patent under the Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 to 869-4 (1976), without consent of the Department of the Interior, triggers reversion of the land to the United States; however, such reversion occurs only after due notice and an opportunity for a hearing has been provided to the patentee.

George Schultz et al., 81 IBLA 29 (May 17, 1984)

The Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 - 869-4 (1982), makes reserved minerals subject to disposition only under applicable laws and such regulations as the Secretary may prescribe. In the absence of such regulations, land classified for disposition and under lease pursuant to the Recreation and Public Purposes Act is not open to location under the mining laws.

E. D. Vonsehr, 82 IBLA 162 (Aug. 6, 1984)

REGULATIONS

GENERALLY

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Harriet C. Shaffel, 79 IBLA 228 (Feb. 29, 1984)

All persons dealing with the Government are presumed to have knowledge of duly promulgated rules and regulations regardless of their actual knowledge of what is contained in such regulations.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision, since the individual is properly charged with knowledge of the true facts.

Tom Ward, 80 IBLA 107 (Apr. 3, 1984)

The Board of Land Appeals has no authority to declare invalid 43 CFR Subpart 3566, a duly promulgated regulation of this Department.

Steve D. Mayberry, Mahlo Jennings, Mark Jennings, 82 IBLA 339 (Sept. 12, 1984)

REGULATIONS--Continued

GENERALLY--Continued

The mere fact that a readjusted coal lease expressly provides that regulations adopted subsequent thereto may be applied does not, ipso facto, make the provisions of the lease fatally indefinite, since it is further provided that express provisions of the lease are not subject to alteration by later regulatory amendments. The applicability to the lease of any specific regulatory provision, however, can only be determined where such regulations have been promulgated and a lessee can show injury in fact in their application.

Mid-Continent Coal & Coke Co., 83 IBLA 56 (Sept. 25, 1984)

APPLICABILITY

Where BLM granted appellant's rights-of-way for communication sites under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), subject to a future appraisal, application of 43 CFR 2803.1-2(b) providing that BLM establish an estimated rental fee, collect the fee in advance, and adjust the advance rental fee upon receipt of an approved fair market appraisal, is not a prohibited imposition of a retroactive rental.

The preferred method for appraising the fair market value of nonlinear rights-of-way, including microwave transmission sites, is the comparable lease method of appraisal where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject sites and other leased sites.

Mountain States Telephone & Telegraph Co., 79 IBLA 5 (Feb. 2, 1984)

An administrative regulation will not be construed to operate retroactively unless the intention to that effect unequivocally appears.

Leo Shea Partnership, 80 IBLA 1 (Mar. 27, 1984)

Where a Departmental regulation governing surface mining provides that no change to state laws or regulations shall be effective for purposes of a state program until approved by the Department as an amendment, new state laws governing surface coal mining reclamation requirements may not be implemented until such approval is given.

Shamrock Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 81 IBLA 374 (June 28, 1984)

Where 43 CFR 4110.3-2 was amended to require supporting data prior to decision in certain cases involving changes in grazing use of the public lands, and the amended regulation became effective prior to decision by the Administrative Law Judge assigned to consider the decision on appeal, the amended rule was properly applied where the basis for the declared policy of the Department respecting grazing decisions rests upon a determination that the amended rule is required by known facts.

A regulation promulgated following decision by the Bureau of Land Management in 1982 is applicable to require use of trend studies to supplement a 1978 range survey where the 1978 survey alone, without trend studies made in intervening years, is an inadequate basis for decision pursuant to 43 CFR 4110.3-2(c) (1983).

Where the Bureau of Land Management uses a 1978 range survey as the sole basis for a 1982 decision limiting range cattle carrying capacity, the decision

REGULATIONS--Continued

APPLICABILITY--Continued

is not adequately supported where circumstances indicate the single survey may be inconclusive as to the true condition of the range under 42 CFR 4110.3-2(c) (1983).

Clyde L. Doring, Douglas L. Rowe v. Bureau of Land Management, 83 IBLA 29 (Sept. 28, 1984)

BINDING ON THE SECRETARY

The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law and are binding on the Department.

Sierra Club, Alaska Chapter, et al., 79 IBLA 112 (Feb. 21, 1984)

The Boards of Appeal of the Department of the Interior do not have the authority to declare a duly promulgated regulation invalid.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

Duly promulgated regulations have the force and effect of law and are binding upon the Department.

Timothy Tarabochia v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 269 (June 6, 1984) 91 I.D. 243

A duly promulgated Departmental regulation has the force and effect of law and is binding upon all officials of the Department, including the Board of Land Appeals and the Secretary, and may not be waived.

A. Z. Shows, 82 IBLA 86 (July 17, 1984)

FORCE AND EFFECT AS LAW

The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law and are binding on the Department.

Sierra Club, Alaska Chapter, et al., 79 IBLA 112 (Feb. 21, 1984)

Chugach Natives, Inc., The Grouse Creek Corp., 80 IBLA 89 (Mar. 30, 1984)

The Boards of Appeal of the Department of the Interior do not have the authority to declare a duly promulgated regulation invalid.

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Duly promulgated regulations have the force and effect of law and are binding upon the Department.

Timothy Tarabochia v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 269 (June 6, 1984) 91 I.D. 243

REGULATIONS--Continued

FORCE AND EFFECT AS LAW--Continued

Duly promulgated regulations have the force and effect of law and are binding on the Department.

Shamrock Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 81 IBLA 374 (June 28, 1984)

INTERPRETATION

Regulations should be so clear that there is no basis for an oil and gas lessee's noncompliance with them, or they should not be interpreted to deprive him of his lease.

James K. Chudnow, 82 IBLA 262 (Aug. 29, 1984)

VALIDITY

The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law and are binding on the Department.

Sierra Club, Alaska Chapter, et al., 79 IBLA 112 (Feb. 21, 1984)

Chugach Natives, Inc., The Grouse Creek Corp., 80 IBLA 89 (Mar. 30, 1984)

The Board of Indian Appeals does not have authority to declare a duly promulgated regulation of the Department to be invalid.

Timothy Tarabochia v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 269 (June 6, 1984) 91 I.D. 243

WAIVER

The Board of Indian Appeals does not have the authority to extend the period for filing a notice of appeal or to waive a properly promulgated Departmental regulation.

Oliver Redfield v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 190 (Mar. 2, 1984)

RENT

When quarters rental rate appeals arise in remote areas where it is not practical to hold hearings, the parties have a special obligation to assist in the resolution of the appeal by prompt and detailed responses to the Board's inquiries concerning the allegations presented to it.

Even if the appellant and the Area Director provide their telephone numbers for use by the Board in connection with an appeal, it is not proper under 4 CFR 4.27 for the Board to become involved in oral (ex parte) communications with either party except in the presence of the other party. Decisions by the Board can be made only on the basis of the appeal record, which includes the parties' initial submissions plus subsequent letters, memoranda, or documents from either side that have been made available to the other side.

Where there is no requirement in the law or regulations, and no other reasonable explanation is offered, for using different bases in making the various adjustments needed to calculate the net monthly basic rental rate for Government-furnished quarters, a consistent basis must be used, even if the instructions

RENT--Continued

for calculating such adjustments on the Department's rental computation worksheet appear to indicate otherwise.

Where date stamps on correspondence indicate that mailing time is only 3 to 5 days one way, a period of 2 months is a sufficient time for the Board to await a reply to its inquiry from an agency respondent. At the end of that time, in the absence of sufficient rebuttal, the allegations of an appellant who claims below-average electrical consumption may be taken as true, and an appellant's monthly electricity bill may be adjusted by the Board accordingly, provided that the claims are not unreasonable.

Walter W. Duncan, 5 OHA 256 (Feb. 8, 1984)

Where a counsel moves to reopen a Board decision and the motion is granted, and the parties are given a period substantially in excess of the time requested in which to submit additional evidence but both fail to do so, the Board is entitled to dispose of the case by a summary affirmation of the original decision.

Jean Rodgers et al. (On Reconsideration), 5 OHA 266 (Feb. 24, 1984)

Where the BLM granted a communications site right-of-way pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), subject to future appraisal, collection of a rental deposit at the time of the grant with a later adjustment in the annual rental charges upon receipt of an approved fair market value appraisal is not a prohibited imposition of a retroactive rental.

Appraisals of rights-of-way for communication sites will be upheld if there is no error in the appraisal methods used by the Bureau of Land Management and the appellant fails to show convincing evidence that the charges are excessive.

Mountain States Telephone & Telegraph Co., 80 IBLA 128 (Apr. 5, 1984)

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive in relation to rates prevailing in the local community, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Jack T. Matuska, 5 OHA 346 (Aug. 24, 1984)

RES JUDICATA

The classification of land as Supplement A, B, or C, by the Oregon Supreme Court in State v. Hyde, 88 Or. 1, 169 P. 757 (1918), is not binding on the United States as to the factual predicates thereof, particularly as the United States was not a party to the case.

State of Oregon et al., I, 78 IBLA 255 (Jan. 10, 1984)

RIGHTS-OF-WAY

GENERALLY

Where BLM granted appellant's rights-of-way for communication sites under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), subject to a future appraisal, application of 43 CFR 2803.1-2(b) providing that BLM establish an estimated rental fee, collect the fee in advance, and adjust the advance rental fee upon receipt of an approved fair market appraisal, is not a prohibited imposition of a retroactive rental.

The preferred method for appraising the fair market value of nonlinear rights-of-way, including microwave transmission sites, is the comparable lease method of appraisal where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject sites and other leased sites.

Mountain States Telephone & Telegraph Co., 79 IBLA 5 (Feb. 2, 1984)

Where a reclamation withdrawal is modified by public land order to authorize a public highway right-of-way pursuant to sec. 8 of the Act of July 26, 1866 (repealed 1976, formerly codified at 43 U.S.C. § 932), the nature and extent of the rights authorized are controlled by the express terms of the public land order restoring the land. A decision to close a road built on a right-of-way within a reclamation withdrawal which is expressly conditioned upon noninterference with the operation and maintenance of a dam and related facilities will be affirmed where the record supports a determination by reclamation officials that public access is substantially interfering with operations and maintenance and the road has been replaced by a new highway open to the public.

County of Imperial, 5 OHA 286 (Mar. 16, 1984)

Where BLM grants a right-of-way for a haul road under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), subject to a future appraisal, BLM may subsequently appraise the land included in the right-of-way, and the rental charges imposed from the date of the right-of-way grant will not be considered retroactive.

Lone Star Steel Co., 79 IBLA 345 (Mar. 22, 1984)

An appellant seeking reversal of a decision denying a protest against issuance of a right-of-way across land in a wilderness study area to state-owned land must show that the decision was premised either on a clear error of law or a demonstrable error of fact. Where state land is encircled by Federal land within a wilderness study area, the state's lessee has a right of access across Federal land pursuant to 16 U.S.C. § 3210(b) (Supp. V 1981) adequate to secure the reasonable use and enjoyment of the leasehold. Because the BLM may not deny such access by requiring the lessee to use helicopters, BLM need not examine the feasibility of helicopter access in its consideration of a right-of-way application.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

Where there is no appraisal to support a readjusted rental rate for a water pipeline right-of-way, a decision imposing the readjusted rate must be reversed.

A. Keith Barben, 81 IBLA 332 (June 19, 1984)

An appraisal of fair market rental for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive.

Southern California Gas Co., 81 IBLA 358 (June 27, 1984)

R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal law. By the time of the R.S. 2477 Idaho grant, Congress had already determined that telephone cables were not within the scope of an R.S. 2477 highway right-of-way. Thus, a telephone cable buried along an R.S. 2477 highway with a right-of-way from the State of Idaho but without the requisite BLM right-of-way is in trespass.

Mountain Bell, 83 IBLA 67 (Sept. 26, 1984)

ACT OF MARCH 4, 1911

Where the BLM granted a communications site right-of-way pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), subject to future appraisal, collection of a rental deposit at the time of the grant with a later adjustment in the annual rental charges upon receipt of an approved fair market value appraisal is not a prohibited imposition of a retroactive rental.

Appraisals of rights-of-way for communication sites will be upheld if there is no error in the appraisal methods used by the Bureau of Land Management and the appellant fails to show convincing evidence that the charges are excessive.

Mountain States Telephone & Telegraph Co., 80 IBLA 128 (Apr. 5, 1984)

Under 43 CFR 2802.1-7(a) (1974), which provided that charges for use and occupancy of a right-of-way may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure where the right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and has not been conformed to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982).

Where BLM appraises a parcel of land subject to a communication site right-of-way for direct sale to the holder of the grant pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), it is proper for BLM to appraise the parcel as if unencumbered, since the right-of-way is extinguished upon the right-of-way holder's acquisition of the fee title.

Cole Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

RIGHTS-OF-WAY--Continued

ACT OF OCTOBER 21, 1976 (FLPMA)

Where BLM grants a right-of-way for a haul road under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), subject to a future appraisal, BLM may subsequently appraise the land included in the right-of-way, and the rental charges imposed from the date of the right-of-way grant will not be considered retroactive.

Lone Star Steel Co., 79 IBLA 345 (Mar. 22, 1984)

APPLICATIONS

An applicant for a right-of-way waives any right to challenge BLM's rejection of its application when the applicant refuses to reimburse the United States, in accordance with the provisions of 43 CFR 2803.1-1(a)(8) and (10), for the costs calculated by BLM to be attributable to the processing of its application.

Smart & Co., 79 IBLA 323 (Mar. 21, 1984)

BLM may properly reject an application for a powerline right-of-way crossing the Snake River pursuant to its discretion under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), in the interest of preserving the scenic quality of the area and protecting raptors listed as endangered and threatened where the record shows the decision to be a reasoned analysis of the factors involved, including the availability of feasible alternatives, made with due regard for the public interest.

Lower Valley Power & Light, Inc., 82 IBLA 216 (Aug. 22, 1984)

APPRAISALS

Where BLM has determined the fair market rental values of a communications site right-of-way in accordance with accepted appraisal procedures but on appeal the grantee presents a summary of evidence that, if proven, would establish that the charge is excessive, the matter will be referred for a hearing at the BLM State Office in accordance with the basic procedural standards set forth in Circle L, Inc., 36 IBLA 260 (1978).

Colorado-Ute Electric Ass'n, Inc., 79 IBLA 53 (Feb. 9, 1984)

An appraisal of a right-of-way for a haul road, granted pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), will be upheld on appeal if no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

Lone Star Steel Co., 79 IBLA 345 (Mar. 22, 1984)

Where the BLM granted a communications site right-of-way pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), subject to future appraisal, collection of a rental deposit at the time of the grant with a later adjustment in the annual rental charges upon receipt of an approved fair market value appraisal is not a prohibited imposition of a retroactive rental.

Appraisals of rights-of-way for communication sites will be upheld if there is no error in the

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

appraisal methods used by the Bureau of Land Management and the appellant fails to show convincing evidence that the charges are excessive.

Mountain States Telephone & Telegraph Co., 80 IBLA 128 (Apr. 5, 1984)

Where there is no appraisal to support a readjusted rental rate for a water pipeline right-of-way, a decision imposing the readjusted rate must be reversed.

A. Keith Barben, 81 IBLA 332 (June 19, 1984)

BLM properly requires the holder of a right-of-way for an access road to pay its fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), but where there is no evidence that BLM considered the question of whether the holder is entitled to a reduced fee because a valuable benefit is provided to the public by maintenance and improvement of the road, the case will be remanded to BLM to consider that question.

William F. Bieber, 82 IBLA 6 (July 2, 1984)

CONDITIONS AND LIMITATIONS

In granting a right-of-way for access over an existing road pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), BLM may not unreasonably burden the right-of-way by requiring upgrading of the road where upgrading is neither commensurate with the holder's intended use of the road nor designed to protect any other resource value which might be adversely affected by such use.

James R. Loonan, Elizabeth K. Loonan, 82 IBLA 395 (Sept. 17, 1984)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

The holder of a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976), is required to pay annually, in advance, the fair market value of the grant. Appellant's contention that it should not pay annual rental is properly rejected where appellant's flood control project is completed but the right-of-way grant remains in effect and the land is being used for a dam, spillway, and reservoir.

Bench Lake Irrigation Co., 78 IBLA 305 (Jan. 12, 1984)

Under Departmental regulation 43 CFR 2803.1-2(c), a nonprofit electric distribution cooperative whose principal source of revenue is customer charges is not eligible for an exemption or reduction of fair market rental imposed for a right-of-way under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976).

Colorado-Ute Electric Ass'n, Inc., 79 IBLA 53 (Feb. 9, 1984)

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g), indicates that under certain circumstances the Secretary of the Interior may charge less than fair market value for annual right-of-way rental, including no charge. However, no reduction or waiver of the fee based on fair market rental will be made if the right-of-way user is a cooperative or similar organization whose principal source of revenue is customer charges.

Wellton-Mohawk Irrigation & Drainage District, 79 IBLA 308 (Mar. 20, 1984)

Where there is no appraisal to support a readjusted rental rate for a water pipeline right-of-way, a decision imposing the readjusted rate must be reversed.

A. Keith Barben, 81 IBLA 332 (June 19, 1984)

A decision imposing rental charges on a Rural Electrification Act cooperative for a powerline right-of-way grant, pursuant to sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), will be set aside where subsequent to the decision that section is amended, P.L. 98-300, 98 Stat. 215 (1984), to provide that rights-of-way shall be granted, without rental fees, for electric facilities financed pursuant to the Rural Electrification Act of 1936.

La Plata Electric Ass'n, Inc., 82 IBLA 159 (Aug. 2, 1984)

A decision imposing rental charges under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), for a right-of-way for a telephone line financed pursuant to the Rural Electrification Act of 1936 will be reversed on appeal to conform to the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, providing that rights-of-way shall be granted without rental fees for such facilities.

Pursuant to sec. 504(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(a) (1982), the Secretary of the Interior has discretion to set the limits of a right-of-way in light of the area to be occupied by the facilities authorized thereunder, the area required for operation and maintenance of the facilities, the area required for protection of public safety, and the area required for protection of the environment against unnecessary damage. An appellant challenging the determination of boundaries for a right-of-way has the burden of showing error.

Peshtigo Telephone Co., Inc., 83 IBLA 86 (Sept. 28, 1984)

NATURE OF INTEREST GRANTED

Where a reclamation withdrawal is modified by public land order to authorize a public highway right-of-way pursuant to sec. 8 of the Act of July 26, 1866 (repealed 1976, formerly codified at 43 U.S.C. § 932), the nature and extent of the rights authorized are controlled by the express terms of the public land order restoring the land. A decision to close a road built on a right-of-way within a reclamation withdrawal which is expressly conditioned upon noninterference with the operation and maintenance of a dam and related facilities will be affirmed where the record supports a determination by reclamation officials that public access is substantially interfering with operations

RIGHTS-OF-WAY--Continued

NATURE OF INTEREST GRANTED--Continued

and maintenance and the road has been replaced by a new highway open to the public.

County of Imperial, 5 OHA 286 (Mar. 16, 1984)

R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal law. By the time of the R.S. 2477 Idaho grant, Congress had already determined that telephone cables were not within the scope of an R.S. 2477 highway right-of-way. Thus, a telephone cable buried along an R.S. 2477 highway with a right-of-way from the State of Idaho but without the requisite BLM right-of-way is in trespass.

Mountain Bell, 83 IBLA 67 (Sept. 26, 1984)

REVISED STATUTES SEC. 2477

Where the State of Idaho accepted a grant pursuant to sec. 8 of the Act of July 26, 1866, 43 U.S.C. § 932, otherwise known as R.S. 2477 (repealed, sec. 706(a) of FLPMA, 90 Stat. 2793), for a highway right-of-way over public lands, the State's right-of-way remains in effect pursuant to sec. 701(a) of FLPMA, 90 Stat. 2786.

R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal law. By the time of the R.S. 2477 Idaho grant, Congress had already determined that telephone cables were not within the scope of an R.S. 2477 highway right-of-way. Thus, a telephone cable buried along an R.S. 2477 highway with a right-of-way from the State of Idaho but without the requisite BLM right-of-way is in trespass.

Mountain Bell, 83 IBLA 67 (Sept. 26, 1984)

RULES OF PRACTICE

GENERALLY

"Last address of record." For the purposes of 43 CFR 1810.2(b), in the context of BLM's processing of a lease application, the address stated on the application is to be used as the "last address of record" unless the applicant has filed written notice of a change of address with the BLM office where the application was filed.

When BLM mails a decision to a lease applicant at an address other than the applicant's address of record, BLM cannot attribute constructive notice of the decision to the applicant under the provisions of 43 CFR 1810.2(b).

Victor E. Oost, Jr., 81 IBLA 144 (May 31, 1984)

APPEALS

Generally

A decision by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 that is not timely appealed to the Board of Indian Appeals is final for the Department.

Clayton J. Wray, v. Deputy Assistant Secretary--Indian Indian Affairs (Operations), 12 IBIA 146 (Jan. 27, 1984)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

A protest to issuance of an oil and gas lease filed after the lease has issued is not timely. Where, however, the "protest" is filed by an individual with subsidiary priority such protest shall be deemed to be an appeal from the rejection of the protestant's application or offer to lease.

Patricia C. Alker, 79 IBLA 123 (Feb. 22, 1984)

Where the Bureau of Land Management issues various decisions applying precedents of the Interior Board of Land Appeals, which precedents have subsequently been reversed on appeal to Federal court, the decisions of the Bureau must be reversed.

Mark Woods et al., 79 IBLA 129 (Feb. 22, 1984)

If an assignment is approved by BLM after BLM has received notice that a private dispute exists as to the validity or effect of the assignment, but before resolution of the private dispute, fairness dictates that the assignment be vacated to restore status quo pending resolution of the dispute.

Charles W. Dorsey et al. (Appellants), Robert L. Meyer, Roger H. Bassey (Appellees), 79 IBLA 209 (Feb. 28, 1984)

A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)
91 I.D. 165

A decision by an Administrative Law Judge setting aside a BLM decision rejecting the grazing preference application of the longstanding holder of a temporary nonrenewable license because of the equities in favor of the applicant will be set aside on appeal and remanded so that BLM may consider whether the applicant is entitled to a grazing permit for the additional forage within a particular allotment in accordance with 43 CFR 4110.3-1 and 4110.5.

Ray Fergbell v. Bureau of Land Management, 80 IBLA 168 (Apr. 13, 1984)

Where the resolution of an appeal depends on the determination of disputed issues of fact, the Board of Land Appeals will often refer the case for an evidentiary hearing on the record before an administrative law judge. However, when the administrative record appears to include nearly all of the available evidence, and affords an adequate basis for decision, and other circumstances indicate that an oral hearing would be unlikely to contribute substantially to the existing record, the Board may determine the facts and decide the appeal on the basis of the record before it.

State of Alaska, Mary Frances DeHart, 82 IBLA 165 (Aug. 6, 1984)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

A party challenging a decision to harvest timber on the grounds that clearcutting is an inappropriate method to be employed and that pertinent environmental considerations were disregarded bears the burden of establishing both the factual predicates and the ultimate conclusions.

Curtin Mitchell & STAND, 82 IBLA 275 (Aug. 31, 1984)

Burden of Proof

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. Where BLM finds that site easements are not necessary to accommodate existing patterns of travel and an appealing party fails to show otherwise, the BLM decision will ordinarily be affirmed. Where BLM's decision rests on an assumption which is not supported by facts of record, it must be set aside for the record to be supplemented.

State of Alaska, 78 IBLA 390 (Jan. 31, 1984)

Pursuant to the provision of sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1976), the Secretary is directed to condition any patent issued thereunder with such terms or reservations as are necessary to ensure proper land use and protect the public interest. A party challenging any such condition must show that it does not reasonably ensure proper land use or protect the public interest.

August & Mary Sobotka, 79 IBLA 340 (Mar. 22, 1984)

When a party appeals a BLM decision, it is the obligation of the appellant to show that the determination is erroneous. Unless a statement of reasons shows adequate reasons for appeal and the allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration.

Howard J. Hunt, Howard M. Hunt, 80 IBLA 396 (May 14, 1984)

Implementation of the Taylor Grazing Act of 1934, as amended, is committed to the discretion of the Secretary of the Interior. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal range code for grazing, 43 CFR Part 4100.

Clyde L. Dorius, Douglas L. Bowe v. Bureau of Land Management, 83 IBLA 29 (Sept. 24, 1984)

Dismissal

A determination under 25 CFR 2.17 as to whether an appeal should be dismissed or decided on the merits when an appellant has failed to submit supporting argumentation must be based on the facts of each case.

M.S.C. Logging, Inc. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 181 (Mar. 1, 1984)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

The conclusion of proceedings under the Freedom of Information Act, as amended, 5 U.S.C. § 552 (1982), to acquire information related to the rationale for the production royalty set in a competitive coal lease does not constitute a final decision by BLM subject to an appeal to the Board, challenging the royalty. The appellant only had a right to protest the royalty set in the notice of the lease sale and to appeal from any denial of that protest.

Coastal States Energy Co., 80 IBLA 274 (May 4, 1984)

A Government motion to dismiss a claim for lost profits and an alternative motion for partial summary judgment on the lost profit claim are both denied in a case where appellant implies that the actions of the contracting officer were in bad faith and asserts that the actions of the contracting officer during the administration of the contract were arbitrary, capricious, and unreasonable. In denying both motions, the Board notes that there are some limited circumstances in which the damages recoverable have not been restricted to those specified in the termination for convenience clause and that at the requested oral hearing, appellant will be afforded the opportunity to prove bad faith or abuse of discretion on the part of the contracting officer such as might avoid the recovery limitations of the convenience-termination clause.

Appeal of Allan D. Barwise, IBCA-1690-6-83 (May 17, 1984) 91 I.D. 253

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

George Schultz et al., 81 IBLA 29 (May 17, 1984)

In a simultaneous oil and gas lease drawing, the first-qualified applicant drawn with first priority is entitled to receive the lease. An appeal is properly dismissed where the appellant fails to point out the grounds on which the decision appealed from is in error, and the allegations in his statement of reasons are irrelevant and immaterial.

Chickasaw Oil & Gas, Inc., 82 IBLA 59 (July 11, 1984)

A notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Donna J. Waldtlow, 82 IBLA 247 (Aug. 28, 1984)

Where the record in a case establishes that the person authorized by a Native group to act as its agent had actual notice of a certificate of ineligibility for such group, and that the notice of appeal was not transmitted within 30 days of such notice, the notice of appeal must be dismissed. The timely filing of a

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

notice of appeal is jurisdictional, and the Board has no authority to waive a jurisdictional requirement.

Nabesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (Sept. 28, 1984)

Effect of

A protest to issuance of an oil and gas lease filed after the lease has issued is not timely. Where, however, the "protest" is filed by an individual with subsidiary priority such protest shall be deemed to be an appeal from the rejection of the protestant's application or offer to lease.

The filing of an appeal from rejection of a lease offer or application preserves the viability of the offer or application during the pendency of the appeal. Thus, if it can be shown that the lease isproperly issued to another party, the lease is properly canceled and may be awarded to the appellant.

Where the lessee of an oil and gas lease fails to pay the annual rental, the lease is terminated. Such termination, however, does not moot an unadjudicated appeal challenging the issuance of the lease to the lessee. Appellant is entitled to an adjudication of her appeal. Upon a determination that the terminated lease was improperly issued to the lessee in the first instance, appellant as the first-qualified applicant may be awarded the lease.

Patricia C. Alker, 79 IBLA 123 (Feb. 22, 1984)

Rejection of an application to lease filed under the automated simultaneous system necessarily encompasses retention of filing fees submitted therewith. Where an application to lease is "rejected" because of a deficiency on the application form, an applicant must either appeal or seek a return of any filing fees within 30 days of rejection. Where an applicant fails to do either, he will be barred from subsequently seeking a return of filing fees on the grounds that the deficiency should properly have been treated as rendering the application "unacceptable."

Shiv Resources, Inc., 79 IBLA 153 (Feb. 24, 1984) 91 I.D. 122

The filing of an appeal from rejection of a lease offer or application preserves the viability of the offer or application during the pendency of the appeal. Thus, where it is shown that the lease improperly issued to another party, the lease is properly canceled and may be awarded to the appellant.

Judy Fleming, 81 IBLA 290 (June 12, 1984)

Where BLM has denied a protest of the proposed issuance of competitive geothermal resources leases pursuant to sec. 4 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1003 (1982), the effect of the decision is stayed during the time the protestant may file an appeal and while the appeal is pending, and issuance of the leases during that time will be considered subject to cancellation by the Board.

Lawrence R. Merchant, 81 IBLA 360 (June 27, 1984)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings

An evidentiary hearing is properly ordered pursuant to 43 CFR 4.415 where the record is inconclusive on an issue of material fact dispositive of the rights of the parties to an appeal.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

Where a simultaneous oil and gas lease applicant, whose application has been rejected because it covers land within a known geologic structure, submits probative evidence contravening the determination that the land is presumptively productive of oil and gas, which is not fully rebutted, but where, nonetheless, questions of fact remain unresolved by the record, a hearing is appropriate to establish a sufficient record to permit decision.

Lloyd Chemical Sales, Inc., 82 IBLA 182 (Aug. 13, 1984)

Motions

A Government motion to dismiss a claim for lost profits and an alternative motion for partial summary judgment on the lost profit claim are both denied in a case where appellant implies that the actions of the contracting officer were in bad faith and asserts that the actions of the contracting officer during the administration of the contract were arbitrary, capricious, and unreasonable. In denying both motions, the Board notes that there are some limited circumstances in which the damages recoverable have not been restricted to those specified in the termination for convenience clause and that at the requested oral hearing, appellant will be afforded the opportunity to prove bad faith or abuse of discretion on the part of the contracting officer such as might avoid the recovery limitations of the convenience-termination clause.

Appeal of Allan D. Barnes, IBCA-1690-6-83 (May 17, 1984) 91 I.D. 253

Reconsideration

In an earlier decision in the context of a contract ambiguity, the Board ruled in the contractor's favor on the costs of supplying certain building components and against the contractor on the costs of installing them. On reconsideration, the contractor convinced the Board that the analogy relied upon in denying the appeal for installation costs was fallacious, but, in reviewing all aspects of the decision on reconsideration, the Board discovered that its rationale for granting any relief on the issue of supplying and installing the components was also erroneous, and therefore affirmed its denial of installation costs and reversed its grant of supply costs. Where there is a patent ambiguity between contract provisions and a contractor fails to make inquiry about it, the contractor may not rely on its interpretation if the Government interpretation differs and will not be allowed to prevail for any alleged extra costs for complying with directions consistent with the Government's interpretation.

Appeal of C. G. Horton Co. (On Reconsideration), IBCA-1647-1-83 (Apr. 23, 1984)

RULES OF PRACTICE--Continued

APPEALS--Continued

Reconsideration--Continued

Where, subsequent to a decision issued by the Board, which decision is premised on certain factual assumptions, a party establishes on the basis of the record before the Board that the facts may not be as assumed, and, as a result, it becomes impossible for the Board to fairly determine the true underlying facts essential to adjudication, the Board decision will be vacated and the case will be remanded to the Hearings Division for a hearing to clarify the matter.

United States v. J. Gary Feezor et al. [On Reconsideration], 81 IBLA 94 (May 29, 1984)

Service on Adverse Party

Failure to serve a copy of the notice of appeal on an adverse party within the time required subjects an appeal to summary dismissal pursuant to 43 CFR 4.413. A motion to dismiss an appeal because of a failure to comply with the service requirement will be denied where the moving party fails to show any prejudice from the failure to serve and the record indicates that the moving party had actual notice of the appeal.

Defenders of Wildlife, 79 IBLA 62 (Feb. 13, 1984)

Where the record in a case establishes that the person authorized by a Native group to act as its agent had actual notice of a certificate of ineligibility for such group, and that the notice of appeal was not transmitted within 30 days of such notice, the notice of appeal must be dismissed. The timely filing of a notice of appeal is jurisdictional, and the Board has no authority to waive a jurisdictional requirement.

Nabesna Native Corp., Inc. [On Reconsideration], 83 IBLA 82 (Sept. 28, 1984)

Standing to Appeal

A decision advising applicant of a perceived defect in his application and allowing 30 days to cure the deficiency is discretionary in nature and, as a general rule, applicant lacks standing to appeal such a decision in the absence of a rejection of his application.

Richard H. Greener, 79 IBLA 234 (Feb. 29, 1984)

Unless a party asserts an "adversely affected" interest, it does not have standing to appeal under 43 CFR 4.410 and its appeal will be dismissed.

Lee Brothers Dredging Co., 79 IBLA 330 (Mar. 21, 1984)

An organization appealing a Bureau of Land Management decision will be considered a "party to a case" having standing to appeal an adverse decision of an officer of the Bureau of Land Management where the organization uses the lands in question and actively and extensively participates in the formulation of land use plans for the lands in question.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Where appellant's statement of reasons for appeal asserts that many of its members live in close proximity to a mine and are adversely affected in their property, aesthetic, and recreational interests as a result of the mine owner's failure to comply with the permitting requirements of the approved Illinois program, appellant has standing to appeal the decision of the Director, OSM, finding that there is no violation by the mine owner.

Citizens for the Preservation of Knox County, 81 IBLA 209 (June 5, 1984)

Where a national conservation organization challenges a Bureau of Land Management determination to proceed with a private exchange, that organization satisfies the requirements of 43 CFR 4.410 by establishing that it is a "party to a case" and that it is adversely affected because its membership uses the public land in question.

National Wildlife Federation, 82 IBLA 303 (Sept. 5, 1984)

A Government motion to dismiss an appeal is denied where the Board determines that it has jurisdiction over an appeal being actively prosecuted by a subcontractor where it finds the prime contractor's sponsorship of the subcontractor's claim is established by the following: (1) The decision from which the appeal was taken was addressed to the prime contractor; (2) the notice of appeal was signed by a representative of the contractor; and (3) the contractor is claiming overhead and profit on the subcontractor's claim.

Appeal of Ohlayashi-Gumi, Ltd., IBCA-1785-3-84 (Sept. 25, 1984) 91 I.D.

Statement of Reasons

In a simultaneous oil and gas lease drawing, the first-qualified applicant drawn with first priority is entitled to receive the lease. An appeal is properly dismissed where the appellant fails to point out the grounds on which the decision appealed from is in error, and the allegations in his statement of reasons are irrelevant and immaterial.

Chickasaw Oil & Gas, Inc., 82 IBLA 59 (July 11, 1984)

Timely Filing

Timely filing of an appeal under the Contract Disputes Act of 1978 is jurisdictional and an appeal filed after the expiration of the 90-day period allowed by the Act is dismissed since the Board has no jurisdiction to consider an untimely filed appeal.

Appeal of Columbia Engineering Corp., IBCA-1776-2-84 (Feb. 29, 1984)

The date of receipt shown on a Postal Service return receipt card will, in the absence of clear proof to the contrary, be presumed to be the date of receipt, and consequently, will control the due date for a notice of appeal.

The Board of Indian Appeals does not have the authority to extend the period for filing a notice of

HOLES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

appeal or to waive a properly promulgated Departmental regulation.

Oliver Redfield v. Deputy Ass't Secretary--Indian Affairs (Operations), 12 IBIA 190 (Mar. 2, 1984)

The conclusion of proceedings under the Freedom of Information Act, as amended, 5 U.S.C. § 552 (1982), to acquire information related to the rationale for the production royalty set in a competitive coal lease does not constitute a final decision by BLM subject to an appeal to the Board, challenging the royalty. The appellant only had a right to protest the royalty set in the notice of the lease sale and to appeal from any denial of that protest.

Coastal States Energy Co., 80 IBLA 274 (May 4, 1984)

With respect to a known party claiming a property interest adversely affected by a decision to issue conveyance under the Alaska Native Claims Settlement Act, both the regulations at 43 CFR 2650.7 and the requirements of due process mandate an effort to serve notice of the decision, coupled with a 30-day appeal period from date of service. Where such a party files a notice of appeal within 30 days of service of the decision, but not within 30 days of publication of that decision in the Federal Register, it is error for the Bureau of Land Management to dismiss the appeal as untimely.

Goodnews Bay Mining Co., et al., 81 IBLA 1 (May 14, 1984)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

George Schultz et al., 81 IBLA 29 (May 17, 1984)

A notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Donna M. Waidlow, 82 IBLA 247 (Aug. 28, 1984)

Where a coal lessee is informed that his lease is being amended to add additional land thereto, and is expressly advised that the additional land will be considered to have been included in the lease as of the date of issuance of the original lease, a lessee who objects to this must file an appeal within 30 days after being notified or is thereafter barred from litigating the propriety of the amendment within the Department.

Mid-Continent Coal & Coke Co., 83 IBLA 56 (Sept. 25, 1984)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

Where the record in a case establishes that the person authorized by a Native group to act as its agent had actual notice of a certificate of ineligibility for such group, and that the notice of appeal was not transmitted within 30 days of such notice, the notice of appeal must be dismissed. The timely filing of a notice of appeal is jurisdictional, and the Board has no authority to waive a jurisdictional requirement.

Wabesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (Sept. 28, 1984)

EVIDENCE

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of materials defining the relationship between the priority applicant and its filing service, the applicant, as the party with peculiar means of knowledge enabling it to prove the nonexistence of such materials, has the burden of doing so. Failure to do so may give rise to an inference that the applicant's evidence is unfavorable.

Hal Carlson, Jr., 78 IBLA 333 (Jan. 24, 1984)

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of an agreement between the lessee as priority applicant and her assignee which would have resulted in a violation of 43 CFR 3102.2-6(a) and (b), the lessee is the party with peculiar means and knowledge enabling her to show the nonexistence of such agreement. Failure or refusal to do so may give rise to an inference that the lessee's evidence is unfavorable.

Patricia C. Alker, 79 IBLA 123 (Feb. 22, 1984)

A prima facie case is made where sufficient evidence is presented to establish the essential facts. Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. It is not necessary to present evidence that is compelling, and the determination must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence and the difficulty which may reasonably be encountered in obtaining the evidence.

S & M Coal Co. & Jewell Smokeless Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 350 (Mar. 22, 1984) 91 I.D. 159

Where a simultaneous oil and gas lease applicant, whose application has been rejected because it covers land within a known geologic structure, submits probative evidence contravening the determination that the land is presumptively productive of oil and gas, which is not fully rebutted, but where, nonetheless, questions of fact remain unresolved by the record, a hearing is appropriate to establish a sufficient record to permit decision.

Lloyd Chesical Sales, Inc., 82 IBLA 182 (Aug. 13, 1984)

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS

In a mining contest initiated by the United States, there is no requirement that the contestee offer evidence concerning matters not placed in issue by the United States. Where the Administrative Law Judge incorrectly places a contrary rule, but in practice applies the correct standard, his decision is affirmed.

In a mining contest initiated by the United States where the Government mineral examiners testify they have examined the mineral claims at issue and found no evidence of mineralization to support a discovery, a prima facie case for the Government is established. This showing is not overcome by evidence of ore sample values offered by contestee to show mineralization, where contestee fails to show from which, of 10 claims at issue, the samples were taken.

Cactus Mines Ltd., 79 IBLA 20 (Feb. 3, 1984)

Where the evidence submitted by a Government mineral examiner supports the conclusion that a 10-acre parcel of land in a placer location is not mineral in character, the burden devolves to the mineral Claimant to overcome this showing by a preponderance of the evidence, failing in which that portion shall be declared invalid.

United States v. Robert B. Lara (On Reconsideration), 80 IBLA 215 (Apr. 30, 1984)

HEARINGS

The holder of a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976), is required to pay annually, in advance, the fair market value of the grant. Appellant's contention that it should not pay annual rental is properly rejected where appellant's flood control project is completed but the right-of-way grant remains in effect and the land is being used for a dam, spillway, and reservoir.

Beach Lake Irrigation Co., 78 IBLA 305 (Jan. 12, 1984)

Due process does not require notice and a prior hearing in every case that an individual is deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

Earth Sciences, Inc., 80 IBLA 28 (Mar. 28, 1984)

Under 43 CFR 2802.1-7(e) (1974), which provided that charges for use and occupancy of a right-of-way may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure where the right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and has not been conformed to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982).

Pole Industries, Inc., 82 IBLA 289 (Aug. 31, 1984)

RULES OF PRACTICE--Continued

HEARINGS--Continued

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. An oral hearing on a color-of-title application will be denied where there are no allegations of fact which would establish the color-of-title claim.

Kim C. Evans, 82 IBLA 319 (Sept. 6, 1984)

PRIVATE CONTESTS

The validity of a mining claim on the issue of discovery of a valuable mineral deposit is not legally cognizable in a bond protest proceeding initiated by the surface owner under a Stock-Raising Homestead Act patent. Such a validity determination requires initiation of a contest with notice to the claimant and an opportunity for a hearing.

Robert M. Michael et ux., 79 IBLA 255 (Mar. 5, 1984)

PROTESTS

A protest to issuance of an oil and gas lease filed after the lease has issued is not timely. Where, however, the "protest" is filed by an individual with subsidiary priority such protest shall be deemed to be an appeal from the rejection of the protestant's application or offer to lease.

Patricia C. Alker, 79 IBLA 123 (Feb. 22, 1984)

The validity of a mining claim on the issue of discovery of a valuable mineral deposit is not legally cognizable in a bond protest proceeding initiated by the surface owner under a Stock-Raising Homestead Act patent. Such a validity determination requires initiation of a contest with notice to the claimant and an opportunity for a hearing.

A decision approving a bond filed by a locator of mining claims for reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed in the absence of a showing that the amount of the bond is inadequate to cover damage to crops, improvements, and the value of the land for grazing purposes.

Robert M. Michael et ux., 79 IBLA 255 (Mar. 5, 1984)

The conclusion of proceedings under the Freedom of Information Act, as amended, 5 U.S.C. § 552 (1982), to acquire information related to the rationale for the production royalty set in a competitive coal lease does not constitute a final decision by BLM subject to an appeal to the Board, challenging the royalty. The appellant only had a right to protest the royalty set in the notice of the lease sale and to appeal from any denial of that protest.

Coastal States Energy Co., 80 IBLA 274 (May 4, 1984)

SCHOOL LANDS

INDEMNITY SELECTIONS

Prior to the promulgation of 43 CFR 2091.2-6, the filing of a state indemnity selection application did not segregate the identified lands from operation of

SCHOOL LANDS--Continued

INDEMNITY SELECTIONS--Continued

tha mining laws prior to classification of the lands as suitable for indemnity selection.

Leo Rhea Partnership, 80 IBLA 1 (Mar. 27, 1984)

BLM may not declare a mining claim located on land subject to a State indemnity selection application null and void ab initio because of the segregative effect arising from the filing of the application pursuant to 43 CFR 2091.2-6 where the state's application was filed prior to promulgation of the regulation.

James B. Houghton, Wm. A. Houghton, 80 IBLA 195 (Apr. 24, 1984)

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

A state selecting indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for unsurveyed school sections within a national forest shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of secs. 16 and 36 therein. Where a protraction on which the state relies to make its indemnity selections reveals that a fractional township is present, the state's entitlement to indemnity lands is calculated according to the pro rata rule set forth at 43 U.S.C. § 852 (1976).

Where a survey on which the state relies to make its indemnity selections pursuant to the Act of Feb. 28, 1891, reveals a fractional township with a school section in place, the state's entitlement should be in an amount equal to the acreage shown by the surveyed school section or in an amount determined by the pro rata rule at the election of the state.

Until a survey of public lands has been run and approved, the designated sections of a township are undefined and the lands are unidentified.

Where the State of Oregon makes an initial selection of indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed fractional township in a national forest, it is not entitled to additional indemnity lands should a subsequent reprotraction or survey be made of the township.

State of Oregon et al., II, 80 IBLA 354 (May 10, 1984)
91 I.D. 212

A mining claim wholly located on land which has been segregated from mineral location by the filing of a state school land indemnity selection application is properly declared null and void ab initio.

When Arizona filed its original application for selection of land as part of its entitlement to compensation for deficiencies for school trust lands pursuant to its enabling act, the Department did not have segregation authority to protect the selections. During the promulgation of 43 CFR 2091.2-6, Arizona submitted a request to have the previous applications withdrawn, consolidated, and amended to include additional lands. This will be deemed a reapplication under the circumstances of this case, the filing of which enabled the Department to segregate the lands described therein under 43 CFR 2091.2-6. Mining claims subsequently initiated on lands that were segregated by the

SCHOOL LANDS--Continued

INDEMNITY SELECTIONS--Continued

reapplication were properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

SECRETARY OF THE INTERIOR

The Secretary of the Interior may require an oil and gas lease offeror to accept stipulations reasonably designed to protect environmental and other land use values as a condition precedent to the issuance of a lease for land located in a national forest. Where on appeal an offeror registers objections concerning such stipulations, and the Forest Service subsequently clarifies the nature of the stipulations and the offeror raises no further complaints, the imposition of the stipulation will be upheld.

James M. Chudnow, Laurent A. Gisshert, 78 IBLA 317 (Jan. 24, 1984)

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. He also has the authority to extend or correct the surveys of public lands as may be necessary.

Joan Ell, 78 IBLA 376 (Jan. 30, 1984)

A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)
91 I.D. 165

A duly promulgated Departmental regulation has the force and effect of law and is binding upon all officials of the Department, including the Board of Land Appeals and the Secretary, and may not be waived.

A. Z. Shows, 82 IBLA 86 (July 17, 1984)

SEGREGATION

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal in the official BLM records is null and void ab initio.

Lamar & Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

BLM may properly declare a mining claim null and void ab initio where located on land segregated from mineral entry on the date of location by a small tract classification order.

J. S. Bowers, 79 IBLA 298 (Mar. 20, 1984)

SEGREGATION--Continued

Where on appeal the Board determines that, in declaring a millsite claim null and void ab initio because it was located on land which had been patented to the state, BLM mistakenly fixed the situs of the claim and that the claim is actually on land open to entry, the Board will reverse the BLM decision.

Savage Construction Co., Inc., 79 IBLA 389 (Mar. 27, 1984)

Prior to the promulgation of 43 CFR 2091.2-6, the filing of a state indemnity selection application did not segregate the identified lands from operation of the mining laws prior to classification of the lands as suitable for indemnity selection.

Leo Shea Partnership, 80 IBLA 1 (Mar. 27, 1984)

BLM may not declare a mining claim located on land subject to a State indemnity selection application null and void ab initio because of the segregative effect arising from the filing of the application pursuant to 43 CFR 2091.2-6 where the state's application was filed prior to promulgation of the regulation.

James R. Houghton, Wm. A. Houghton, 80 IBLA 195 (Apr. 24, 1984)

When Arizona filed its original application for selection of land as part of its entitlement to compensation for deficiencies for school trust lands pursuant to its enabling act, the Department did not have segregation authority to protect the selections. During the promulgation of 43 CFR 2091.2-6, Arizona submitted a request to have the previous applications withdrawn, consolidated, and amended to include additional lands. This will be deemed a reapplication under the circumstances of this case, the filing of which enabled the Department to segregate the lands described therein under 43 CFR 2091.2-6. Mining claims subsequently initiated on lands that were segregated by the reapplication were properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

A homestead application segregates land from subsequent entry by a Native seeking to establish use and occupancy under the Native Allotment Act until the homestead entry is canceled on the official records of the Bureau of Land Management.

Nick E. Desientieff, State of Alaska, 81 IBLA 303 (June 15, 1984)

A mining claim located on land segregated from such location by the filing of a state selection application is properly declared null and void ab initio; however, where the case record is unclear whether the land embraced by the claim was segregated by an application predating the location or whether the land was segregated by an amendment to the application filed subsequent to the location, the decision will be set aside and the case remanded.

Elizabeth G. Hiellen et al., 81 IBLA 341 (June 21, 1984)

Elsie May Staude, 82 IBLA 226 (Aug. 22, 1984)

SEGREGATION--Continued

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Western Nuclear, Inc., 82 IBLA 67 (July 12, 1984)

A mining claim located on land segregated from such location by the filing of a state selection application is properly declared null and void ab initio.

Ronald R. Kotowski, 82 IBLA 317 (Sept. 6, 1984)

SMALL TRACT ACT

GENERALLY

The Small Tract Act, 43 U.S.C. § 682a (1970), was repealed by sec. 702 of the Federal Land Policy and Management Act of 1976, Oct. 21, 1976.

M. Lawrence Bork, 81 IBLA 366 (June 27, 1984)

APPLICATIONS

The mere filing of a small tract application did not create in the applicant any right or interest in the land sought. An applicant for land under the Small Tract Act, 43 U.S.C. § 682a (1970), did not acquire any right or interest in the land embraced in his application by virtue of administrative delay in processing the application.

M. Lawrence Bork, 81 IBLA 366 (June 27, 1984)

CLASSIFICATION

BLM may properly declare a mining claim null and void ab initio where located on land segregated from mineral entry on the date of location by a small tract classification order.

W. S. Bowers, 79 IBLA 298 (Mar. 20, 1984)

SOLICITOR, DEPARTMENT OF THE INTERIOR

Where a counsel moves to reopen a Board decision and the motion is granted, and the parties are given a period substantially in excess of the time requested in which to submit additional evidence but both fail to do so, the Board is entitled to dispose of the case by a summary affirmation of the original decision.

Jean Rodgers et al. (On Reconsideration), 5 OHA 266 (Feb. 24, 1984)

STATE COURTS

Neither the Board of Indian Appeals nor the Department of the Interior has review authority over matters entrusted to state, federal, or tribal courts.

Neither the Board of Indian Appeals nor the Department of the Interior is the proper forum for

STATE COURTS--Continued

consideration of questions relating to contrast property held by Indians.

Estate of Alice Tso Gasse, 12 IBIA 281 (June 25, 1984)

STATE EXCHANGES

GENERALLY

Where a deed embracing certain base lands is tendered to the United States in an application for an exchange under the Forest Lieu Exchange Act, Act of June 4, 1897, 30 Stat. 11, which title is based on a deed issued for state school lands to a fictitious individual, such deed vests no title in the United States. Where, however, the state deed is issued to a real person, even though it may have been fraudulently obtained from the state, acceptance by the United States of the exchange application is sufficient to vest title in the United States to the base property, even though that title might be subject to defeasance in a proper proceeding.

Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 11, title to the base property vested in the United States. Such title was not divested by either the subsequent refusal of the United States to complete the exchange or by the acquisition of the selection rights emanating from the acceptance of the application by a third-party which had been defrauded of the base lands through the actions of the original applicant.

Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 11, which application was based on base lands fraudulently secured from a state, and the state subsequently obtained a quitclaim from the applicant of all his interest in the lands, the state did not regain title to the base lands but rather was vested with all selection rights which had properly appertained to the exchange application.

Where the record establishes that, but for the actions of the Department in improperly approving an exchange, a State would have properly exercised its exchange rights pursuant to applicable law, the Department will be estopped from subsequently asserting the exchange was improper where, as here, it would no longer be possible for the state to exercise its exchange rights.

Under the United States Supreme Court's decision in Wyoming v. United States, 255 U.S. 489 (1921), an application for a forest lieu exchange was accepted by the filing of a proper exchange and the acceptability of an exchange was to be judged with reference to the facts existing at the time of filing. The actual acceptance of an exchange application, however, even if based on a misapprehension of the facts, vested title to the offered lands in the United States.

The classification of land as Supplement A, B, or C, by the Oregon Supreme Court in State v. Hyde, 88 Or. 1, 169 P. 757 (1918), is not binding on the United States as to the factual predicates thereof, particularly as the United States was not a party to the case.

When a state obtained a quitclaim deed from a forest lieu applicant whose application had been accepted by the United States, the state merely acquired the same rights to complete the selection which were possessed by the original applicant. Where the state failed to record this forest lieu selection right under the Act of Aug. 5, 1955, 69 Stat. 534, or tender such right for payment under the Act of July 6, 1960, 74 Stat. 334, all rights flowing from the forest

STATE EXCHANGES--Continued

GENERALLY--Continued

lieu selection right to either complete an exchange or have the base property reconveyed terminated.

While it is a general rule that adverse possession does not run against a state, this rule does not apply as against the United States. Where the United States has maintained open and notorious possession of certain parcels of land for over 80 years, the United States has acquired title to those parcels through adverse possession even though the record title holder was a state.

State of Oregon et al., I, 78 IBLA 255 (Jan. 10, 1984)
91 I.D. 14

STATE GRANTS

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

State of Oregon et al., II, 80 IBLA 354 (May 10, 1984)
91 I.D. 212

STATE LANDS

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

State of Oregon et al., II, 80 IBLA 354 (May 10, 1984)
91 I.D. 212

STATE LAWS

A state retains extensive jurisdiction over Federal lands within its boundary, but Congress is authorized to enact legislation regarding the use and occupancy of the Federal lands. Provisions of state law regarding abandonment of a right-of-way within a reclamation withdrawal must recede where implementation thereof would interfere with the effort of reclamation officials to operate and maintain reclamation facilities as directed by Act of Congress.

County of Imperial, 5 OHA 286 (Mar. 16, 1984)

STATE SELECTIONS

Where on appeal the Board determines that, in declaring a millsite claim null and void ab initio because it was located on land which had been patented to the State, BLM mistakenly fixed the situs of the claim and that the claim is actually on land open to entry, the Board will reverse the BLM decision.

Savage Construction Co., Inc., 79 IBLA 389 (Mar. 27, 1984)

STATE SELECTIONS--Continued

Prior to the promulgation of 43 CFR 2091.2-6, the filing of a state indemnity selection application did not segregate the identified lands from operation of the mining laws prior to classification of the lands as suitable for indemnity selection.

Leo Rhea Partnership, 80 IBLA 1 (Mar. 27, 1984)

BLM may not declare a mining claim located on land subject to a State indemnity selection application null and void ab initio because of the segregative effect arising from the filing of the application pursuant to 43 CFR 2091.2-6 where the state's application was filed prior to promulgation of the regulation.

James R. Houghton, Wm. A. Houghton, 80 IBLA 195 (Apr. 24, 1984)

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

A state selecting indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for unsurveyed school sections within a national forest shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of secs. 16 and 36 therein. Where a protraction on which the state relies to make its indemnity selections reveals that a fractional township is present, the state's entitlement to indemnity lands is calculated according to the pro rata rule set forth at 43 U.S.C. § 852 (1976).

Where a survey on which the state relies to make its indemnity selections pursuant to the Act of Feb. 28, 1891, reveals a fractional township with a school section in place, the state's entitlement should be in an amount equal to the acreage shown by the surveyed school section or in an amount determined by the pro rata rule at the election of the state.

Until a survey of public lands has been run and approved, the designated sections of a township are undefined and the lands are unidentified.

Where the State of Oregon makes an initial selection of indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed fractional township in a national forest, it is not entitled to additional indemnity lands should a subsequent reprotraction or survey be made of the township.

State of Oregon et al., II, 80 IBLA 354 (May 10, 1984)
91 I.D. 212

A mining claim wholly located on land which has been segregated from mineral location by the filing of a state school land indemnity selection application is properly declared null and void ab initio.

When Arizona filed its original application for selection of land as part of its entitlement to compensation for deficiencies for school trust lands pursuant to its enabling act, the Department did not have segregation authority to protect the selections. During the promulgation of 43 CFR 2091.2-6, Arizona submitted a request to have the previous applications withdrawn, consolidated, and amended to include additional lands. This will be deemed a reapplication under the circumstances of this case, the filing of which enabled the Department to segregate the lands described therein under 43 CFR 2091.2-6. Mining claims subsequently

STATE SELECTIONS--Continued

initiated on lands that were segregated by the reapplication were properly declared null and void ab initio.

Amoco Minerals Co., 81 IBLA 23 (May 15, 1984)

A mining claim located on land segregated from such location by the filing of a state selection application is properly declared null and void ab initio; however, where the case record is unclear whether the land embraced by the claim was segregated by an application predating the location or whether the land was segregated by an amendment to the application filed subsequent to the location, the decision will be set aside and the case remanded.

Elizabeth S. Hjellen et al., 81 IBLA 341 (June 21, 1984)

Elsie May Staude, 82 IBLA 226 (Aug. 22, 1984)

A mining claim located on land segregated from such location by the filing of a state selection application is properly declared null and void ab initio.

Ronald R. Kotowski, 82 IBLA 317 (Sept. 6, 1984)

STATUTES

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Harriet C. Shaffel, 79 IBLA 228 (Feb. 29, 1984)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision, since the individual is properly charged with knowledge of the true facts.

Tom Hurd, 80 IBLA 107 (Apr. 3, 1984)

STATUTORY CONSTRUCTION

GENERALLY

Although the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), may be characterized as a remedial statute, this does not support the proposition that it should be construed liberally. Every waiver of sovereign immunity is remedial, and statutes waiving sovereign immunity such as the Equal Access to Justice Act must be strictly construed.

Fayces Bentonite Corp., 79 IBLA 182 (Feb. 28, 1984)
91 I.D. 138

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(f) (1982), was intended by Congress to have application to patents issued to mining claims perfected after passage of the Act. A patent to a mining claim which had been

STATUTORY CONSTRUCTION--Continued

GENERALLY--Continued

perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Effect must be given, if possible, to every word, clause, and sentence in a statute. Therefore, the application of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), to mineral patent must be made in a manner which recognizes valid existing rights of a mineral claimant at the time of passage of the Act.

California Portland Cement Corp., 83 IBLA 11 (Sept. 18, 1984)

ADMINISTRATIVE CONSTRUCTION

In deciding whether to adopt a newly enunciated rule retroactively the Board of Land Appeals has adopted the balance test which essentially rests on balancing the adverse effects of retroactivity with any statutory interest in applying the rule.

Victor N. Shaw, Jr. (On Reconsideration), 82 IBLA 241 (Aug. 27, 1984)

IMPLIED REPEALS

The conclusion that the Appropriations Act is independent leasing authority is not an implied repeal, pro tanto, of the Mineral Leasing Act of 1920 because the Naval Petroleum Reserves Production Act of 1976 explicitly precluded the operation of the MLA on the NPR-A, and the Appropriations Act modified that withdrawal only for the purpose of the oil and gas leasing program authorized in the Appropriations Act.

Authorization for Oil and Gas Leasing on the National Petroleum Reserve--Alaska, M-36940 (Oct. 15, 1981) 91 I.D. 1

LEGISLATIVE HISTORY

Legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

Andy D. Rutledge et al., 82 IBLA 89 (July 17, 1984)

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

California Portland Cement Corp., 83 IBLA 11 (Sept. 18, 1984)

STOCK-RAISING HOMESTEADS

A decision approving a bond filed by a locator of mining claims for reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed in the absence of a showing that the amount of the bond is inadequate to cover damage to crops, improvements, and the value of the land for grazing purposes.

Robert M. Michael et ux., 79 IBLA 255 (Mar. 5, 1984)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

ADMINISTRATIVE PROCEDURE

Generally

Where an application for review alleges only that a notice of violation or cessation order is "improper" and the applicant does not amend or move to amend the application to specifically contest the fact of violation and does not object to exclusion of that issue at the hearing, the hearing may properly be limited to the issue of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement.

Titan Coal Corp. v. Office of Surface Mining Reclamation and Enforcement, 78 IBLA 205 (Jan. 5, 1984)

When the record accompanying a decision by the Office of Surface Mining Reclamation and Enforcement responding to a citizen complaint filed pursuant to 30 CFR 721.13 provides no information upon which an objective, independent review of the basis for the decision can be conducted by the Board, the decision will be set aside and the case remanded for further consideration.

Fred D. Zerfoss et ux., 81 IBLA 14 (May 14, 1984)

Burden of Proof

The application of the general rule that in hearing proceedings initiated by a petition for review OSM has the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of violation and as to the amount of the penalty must take into account the issues actually raised in a petition for review. Where a petitioner did not specify any error in OSM's calculation of a proposed civil penalty, OSM's evidentiary burden in the review proceeding was limited to prevailing in its case in support of the merits of the alleged violations.

OSM satisfied the burden of persuasion in support of an alleged violation of the permit requirement in 30 CFR 710.11(a)(2) when, in an evidentiary hearing, OSM demonstrated that the subject mining activity was conducted after May 3, 1978, and that OSM had been unable to discover evidence of a state permit covering the activity, and the person charged with the violation did not offer any documentary evidence in support of the assertion that the subject mining activity was covered by an existing state permit.

Bell Coal Co. v. Office of Surface Mining Reclamation & Enforcement (On Reconsideration), 81 IBLA 385 (June 28, 1984)

Scope of Review

Where an application for review alleges only that a notice of violation or cessation order is "improper" and the applicant does not amend or move to amend the application to specifically contest the fact of violation and does not object to exclusion of that issue at the hearing, the hearing may properly be limited to the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Scope of Review--Continued

issue of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement.

Titan Coal Corp., v. Office of Surface Mining Reclamation and Enforcement, 78 IBLA 205 (Jan. 5, 1984)

APPEALS

Generally

Where an application for review alleges only that a notice of violation or cessation order is "improper" and the applicant does not amend or move to amend the application to specifically contest the fact of violation and does not object to exclusion of that issue at the hearing, the hearing may properly be limited to the issue of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement.

Titan Coal Corp., v. Office of Surface Mining Reclamation and Enforcement, 78 IBLA 205 (Jan. 5, 1984)

OSM properly refused to conduct a Federal inspection or undertake enforcement action where a mine owner continued to conduct only reclamation operations under an interim permit after 8 months following approval of a state's permanent program. SMCRA and the applicable regulations do not require an operator who has ceased all mining operations prior to the approval of a state's permanent program to obtain a permanent program permit.

Citizens for the Preservation of Knox County, 81 IBLA 209 (June 5, 1984)

APPLICABILITY

Generally

One claiming an exemption from regulation under the Act bears the burden of affirmatively demonstrating entitlement to that exemption.

Titan Coal Corp., v. Office of Surface Mining Reclamation and Enforcement, 78 IBLA 205 (Jan. 5, 1984)

Where the Office of Surface Mining Reclamation and Enforcement issued a notice of violation charging a violation of regulations in 30 CFR Part 211 (1980) at a surface coal mining operation on Indian land, the notice was properly vacated since the scope provision of those regulations, 30 CFR 211.1(a), specifically excluded from the coverage of 30 CFR Part 211 operations on Indian land.

Peabody Coal Co., v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 14 (Feb. 3, 1984)

One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977 bears the burden of affirmatively demonstrating entitlement to the exemption.

A coal mine which disturbs less than 2 acres of surface land is exempt from the application of the Surface Mining Control and Reclamation Act of 1977. However, an operation which is less than 2 acres in size can be under the purview of the Act if it is one of a number of operations which are collectively disturbing in excess of 2 acres and which can logically be considered to be one mine. The party claiming that an

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPLICABILITY--Continued

Generally--Continued

operation is, in fact, one of a number of sites which make up a single mine disturbing in excess of 2 acres carries the burden of establishing that fact.

S & K Coal Co. & Jewell Smokeless Coal Co., v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 350 (Mar. 22, 1984) 91 I.D. 159

Initial Regulatory Program

As a general performance obligation under the initial Federal regulatory program, a person who conducts surface coal mining and reclamation operations on and after May 3, 1978, must obtain a state permit for the operations if required to do so under state law. When state law defines surface coal mining to include exploration activity, the Federal performance obligation extends to such activity.

The general performance obligation under the initial Federal regulatory program that a person who conducts surface coal mining and reclamation operations on and after May 3, 1978, must obtain a state permit for the operations if required to do so under state law is applicable to persons who allow mining operations on lands under their legal control even when the persons are not actually engaged in the mining operations.

The obligation under the Federal initial regulatory program of a person who conducts surface coal mining and reclamation operations to obtain a state permit for the operations if required to do so under state law is applicable only in the context of mining operations conducted on and after May 3, 1978; therefore, action by OSM to enforce the obligation was not properly upheld in the absence of evidence that the subject mining activity occurred after that date.

OSM satisfied the burden of persuasion in support of an alleged violation of the permit requirement in 30 CFR 710.11(a)(2) when, in an evidentiary hearing, OSM demonstrated that the subject mining activity was conducted after May 3, 1978, and that OSM had been unable to discover evidence of a state permit covering the activity, and the person charged with the violation did not offer any documentary evidence in support of the assertion that the subject mining activity was covered by an existing state permit.

OSM lacked regulatory authority to enforce the special performance standards in 30 CFR 716.5(b) (applicable to anthracite surface coal mining and reclamation operations in the Commonwealth of Pennsylvania) with respect to surface coal mining and reclamation operations conducted only before May 3, 1978.

Where OSM demonstrated in an evidentiary hearing that particular surface coal mining and reclamation operations were not covered by a state approved mining plan at the time of OSM's inspection of the operations, OSM was precluded, as a matter of law, from establishing its allegation that the person conducting the mining operations had failed to accomplish backfilling in accordance with an approved mining plan.

Bell Coal Co., v. Office of Surface Mining Reclamation & Enforcement (on Reconsideration), 81 IBLA 385 (June 28, 1984)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS

Generally

OSM properly takes enforcement action against the owner of a surface coal mining operation who fails to submit a timely and complete application for a permanent program permit and who continues to operate under an interim permit after 8 months following approval of a state's permanent program.

Virginia Citizens for Better Reclamation, Virginia D. Hill, 82 IBLA 37 (July 10, 1984) 91 I.D. 247

CITIZEN COMPLAINTS

Generally

When the record accompanying a decision by the Office of Surface Mining Reclamation and Enforcement responding to a citizen complaint filed pursuant to 30 CFR 721.13 provides no information upon which an objective, independent review of the basis for the decision can be conducted by the Board, the decision will be set aside and the case remanded for further consideration.

Fred D. Zerkoss et ux., 81 IBLA 14 (May 14, 1984)

The Office of Surface Mining may properly decline to take enforcement action on a citizen's complaint alleging improper restoration of the citizen's land under 30 CFR 721.13 where multiple inspections fail to confirm the allegations made.

Kenneth Marsh, 82 IBLA 3 (July 2, 1984)

DISCRIMINATION

Generally

Sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), prohibits any "person" from discriminating against any employee by reason of his involvement in any proceeding under the Act. An aggrieved employee may file an application for review of any such discrimination with the Department of the Interior. For purposes of sec. 703 employee protection proceedings, the state agency charged with enforcement of the Act is not deemed a person within the meaning of the statute where review of alleged discriminatory action is sought by one of its employees.

Jason E. Lober v. Pennsylvania Dept. of Environmental Resources, 80 IBLA 200 (Apr. 24, 1984) 91 I.D. 197

EMPLOYEE PROTECTION

Generally

Sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), prohibits any "person" from discriminating against any employee by reason of his involvement in any proceeding under the Act. An aggrieved employee may file an application for review of any such discrimination with the Department of the Interior. For purposes of sec. 703 employee protection proceedings, the state agency charged with enforcement of the Act is not deemed a person within the meaning of the statute where review

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EMPLOYEE PROTECTION--Continued

Generally--Continued

of alleged discriminatory action is sought by one of its employees.

Jason E. Lober v. Pennsylvania Dept. of Environmental Resources, 80 IBLA 200 (Apr. 24, 1984) 91 I.D. 197

EVIDENCE

Generally

A prima facie case is made where sufficient evidence is presented to establish the essential facts. Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. It is not necessary to present evidence that is compelling, and the determination must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence and the difficulty which may reasonably be encountered in obtaining the evidence.

S & M Coal Co. & Jewell Smokeless Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 350 (Mar. 22, 1984) 91 I.D. 159

HEARINGS

Generally

The application of the general rule that in hearing proceedings initiated by a petition for review OSM has the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of violation and as to the amount of the penalty must take into account the issues actually raised in a petition for review. Where a petitioner did not specify any error in OSM's calculation of a proposed civil penalty, OSM's evidentiary burden in the review proceeding was limited to prevailing in its case in support of the merits of the alleged violations.

Bell Coal Co. v. Office of Surface Mining Reclamation & Enforcement (On Reconsideration), 81 IBLA 385 (June 28, 1984)

Procedure

Where an application for review alleges only that a notice of violation or cessation order is "improper" and the applicant does not amend or move to amend the application to specifically contest the fact of violation and does not object to exclusion of that issue at the hearing, the hearing may properly be limited to the issue of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement.

Titan Coal Corp. v. Office of Surface Mining Reclamation and Enforcement, 78 IBLA 205 (Jan. 5, 1984)

INITIAL REGULATORY PROGRAM

Generally

The owner of a surface coal mining operation who operates a coal refuse disposal area without a permit required by State regulation may properly be cited

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INITIAL REGULATORY PROGRAM--Continued

General1y--Continued

by OSM for violation of 30 CFR 710.11(a)(2), which requires compliance with State permit requirements.

Republic Steel Corp. & BCNR Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 315 (Mar. 21, 1984)

As a general performance obligation under the initial Federal regulatory program, a person who conducts surface coal mining and reclamation operations on and after May 3, 1978, must obtain a state permit for the operations if required to do so under state law. When state law defines surface coal mining to include exploration activity, the Federal performance obligation extends to such activity.

The general performance obligation under the initial Federal regulatory program that a person who conducts surface coal mining and reclamation operations on and after May 3, 1978, must obtain a state permit for the operations if required to do so under state law is applicable to persons who allow mining operations on lands under their legal control even when the persons are not actually engaged in the mining operations.

The obligation under the Federal initial regulatory program of a person who conducts surface coal mining and reclamation operations to obtain a state permit for the operations if required to do so under state law is applicable only in the context of mining operations conducted on and after May 3, 1978; therefore, action by OSM to enforce the obligation was not properly upheld in the absence of evidence that the subject mining activity occurred after that date.

OSM satisfied the burden of persuasion in support of an alleged violation of the permit requirement in 30 CFR 710.11(a)(2) when, in an evidentiary hearing, OSM demonstrated that the subject mining activity was conducted after May 3, 1978, and that OSM had been unable to discover evidence of a state permit covering the activity, and the person charged with the violation did not offer any documentary evidence in support of the assertion that the subject mining activity was covered by an existing state permit.

OSM lacked regulatory authority to enforce the special performance standards in 30 CFR 716.5(b) (applicable to anthracite surface coal mining and reclamation operations in the Commonwealth of Pennsylvania) with respect to surface coal mining and reclamation operations conducted only before May 3, 1978.

Where OSM demonstrated in an evidentiary hearing that particular surface coal mining and reclamation operations were not covered by a state approved mining plan at the time of OSM's inspection of the operations, OSM was precluded, as a matter of law, from establishing its allegation that the person conducting the mining operations had failed to accomplish backfilling in accordance with an approved mining plan.

Bell Coal Co. v. Office of Surface Mining Reclamation & Enforcement (On Reconsideration), 81 IBLA 385 (June 28, 1984)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION

General1y

Where the Office of Surface Mining Reclamation and Enforcement issued a notice of violation charging a violation of regulations in 30 CFR Part 211 (1980) at a surface coal mining operation on Indian land, the notice was properly vacated since the scope provision of those regulations, 30 CFR 211.1(a), specifically excluded from the coverage of 30 CFR Part 211 operations on Indian land.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 14 (Feb. 3, 1984)

The owner of a surface coal mining operation who operates a coal refuse disposal area without a permit required by State regulation may properly be cited by OSM for violation of 30 CFR 710.11(a)(2), which requires compliance with State permit requirements.

Republic Steel Corp. & BCNR Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 315 (Mar. 21, 1984)

Permittees

Under the initial regulatory program one who conducts a surface coal mining operation regulated by a state under state law is a permittee whether or not required to hold a permit under state law. The permittee is responsible for compliance with the performance standards applicable to the operation. If there is question as to who is responsible for compliance with those standards, it is proper for the inspector issuing the notice of violation to cite all of the parties who may be responsible. If a cited party can submit sufficient proof that it is not responsible for compliance, the violation will not be considered a violation by that party.

Under the initial regulatory program, if there is no valid permit in existence with respect to a coal mining operation and the coal is being mined pursuant to an oral lease, both the party extracting the coal and the lessor can be considered to be permittees, as both have the ability to exercise control over the operations.

S & P Coal Co. & Jewell Smokeless Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 350 (Mar. 22, 1984) 91 I.D. 159

PERMIT APPLICATION

General1y

OSM properly refused to conduct a Federal inspection or undertake enforcement action where a mine owner continued to conduct only reclamation operations under an interim permit after 8 months following approval of a state's permanent program. SMCRA and the applicable regulations do not require an operator who has ceased all mining operations prior to the approval of a state's permanent program to obtain a permanent program permit.

Where, under circumstances of this case, it is determined that reclamation operations proceeding under an interim permit do not require a permanent program permit, such operations need not comply with the public participation and substantive reclamation requirements of the permanent program.

Citizens for the Preservation of Knox County, 81 IBLA 209 (June 5, 1984)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMIT APPLICATION--Continued

Generally--Continued

OSM properly takes enforcement action against the owner of a surface coal mining operation who fails to submit a timely and complete application for a permanent program permit and who continues to operate under an interim permit after 8 months following approval of a state's permanent program.

Virginia Citizens for Better Reclamation, Virginia D. Hill, 82 IBLA 37 (July 16, 1984) 91 I.D. 247

STATE PROGRAM

Generally

Where a Departmental regulation governing surface mining provides that no change to state laws or regulations shall be effective for purposes of a state program until approved by the Department as an amendment, new state laws governing surface coal mining reclamation requirements may not be implemented until such approval is given.

Shamrock Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 81 IBLA 374 (June 28, 1984)

TEMPORARY RELIEF

Evidence

A party seeking temporary relief from enforcement action by the Office of Surface Mining Reclamation and Enforcement must show a substantial likelihood that the findings and decision of the Administrative Law Judge in the matter to which the application relates will be favorable to the applicant.

Shamrock Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 81 IBLA 374 (June 28, 1984)

TIPPLES AND PROCESSING PLANTS

At or Near a Minesite

"Surface coal mining operations." Decisions of the Interior Board of Surface Mining and Reclamation Appeals established a two-part test for determining whether an offsite facility was conducting surface coal mining operations, as defined in the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, by requiring that the facility be operated in connection with a surface coal mine and that it be located at or near the minesite. However, court decisions and revised Departmental regulations have made it clear that in order to be conducting surface coal mining operations, an offsite facility which is involved in certain listed activities need only be operated in connection with a surface coal mine, while a facility involved only in the loading of coal for interstate commerce must be operated in connection with a surface coal mine, and that facility must be located at or near the minesite.

"At or near a minesite." A coal loading facility is "at or near a minesite" within the meaning of surface coal mining operations in 30 CFR 700.5 where it operates on the same permit area as the minesite or it is physically integrated with the minesite to the extent that any potential or actual environment damage

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

TIPPLES AND PROCESSING PLANTS--Continued

At or Near a Minesite--Continued

associated with the mining operation cannot be effectively addressed by OSM without regard to the loading operation.

Ann Lorentz Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 34 (Feb. 9, 1984) 91 I.D. 108

In Connection With

"Surface coal mining operations." Decisions of the Interior Board of Surface Mining and Reclamation Appeals established a two-part test for determining whether an offsite facility was conducting surface coal mining operations, as defined in the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, by requiring that the facility be operated in connection with a surface coal mine and that it be located at or near the minesite. However, court decisions and revised Departmental regulations have made it clear that in order to be conducting surface coal mining operations, an offsite facility which is involved in certain listed activities need only be operated in connection with a surface coal mine, while a facility involved only in the loading of coal for interstate commerce must be operated in connection with a surface coal mine, and that facility must be located at or near the minesite.

Ann Lorentz Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 34 (Feb. 9, 1984) 91 I.D. 108

VARIANCES AND EXEMPTIONS

2-Acre

One claiming an exemption from regulation under the Act bears the burden of affirmatively demonstrating entitlement to that exemption.

Titan Coal Corp. v. Office of Surface Mining Reclamation and Enforcement, 78 IBLA 205 (Jan. 5, 1984)

One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977 bears the burden of affirmatively demonstrating entitlement to the exemption.

A coal mine which disturbs less than 2 acres of surface land is exempt from the application of the Surface Mining Control and Reclamation Act of 1977. However, an operation which is less than 2 acres in size can be under the purview of the Act if it is one of a number of operations which are collectively disturbing in excess of 2 acres and which can logically be considered to be one mine. The party claiming that an operation is, in fact, one of a number of sites which make up a single mine disturbing in excess of 2 acres carries the burden of establishing that fact.

S & M Coal Co. & Jewell Smokeless Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 350 (Mar. 22, 1984) 91 I.D. 159

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

WORDS AND PHRASES

"Surface coal mining operations." Decisions of the Interior Board of Surface Mining and Reclamation Appeals established a two-part test for determining whether an offsite facility was conducting surface coal mining operations, as defined in the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, by requiring that the facility be operated in connection with a surface coal mine and that it be located at or near the minesite. However, court decisions and revised Departmental regulations have made it clear that in order to be conducting surface coal mining operations, an offsite facility which is involved in certain listed activities need only be operated in connection with a surface coal mine, while a facility involved only in the loading of coal for interstate commerce must be operated in connection with a surface coal mine, and that facility must be located at or near the minesite.

"At or near a minesite." A coal loading facility is "at or near a minesite" within the meaning of surface coal mining operations in 30 CFR 700.5 where it operates on the same permit area as the minesite or it is physically integrated with the minesite to the extent that any potential or actual environment damage associated with the mining operation cannot be effectively addressed by OSM without regard to the loading operation.

Ann Lorentz Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 79 IBLA 34 (Feb. 9, 1984)
91 I.D. 108

SURPLUS PROPERTY

Where oil and gas deposits in lands acquired by the United States and devoted to use for military purposes become "surplus property" under the Federal Property and Administrative Services Act, such deposits may be leased only under the provisions of that Act, and are not subject to leasing under the Mineral Leasing Act for Acquired Lands.

Gerald B. Waters, 78 IBLA 387 (Jan. 31, 1984)

SURVEYS OF PUBLIC LANDS

GENERALLY

The dependent resurvey is designed to restore the original conditions of the official survey according to the record. It is based, first, upon identified corners and other acceptable points of control, and second, upon the restoration of lost corners by proportionate measurement in harmony with the record of the original survey. Corners established by the original survey should be located, if possible, by considering all the relevant evidence and not simply one or two factors. The rules for the restoration of lost corners should not be applied until all available original and collateral evidence has been developed.

Jean Ell, 78 IBLA 374 (Jan. 30, 1984)

A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to the course or distance or the quantity of land stated to be conveyed.

Elmer L. Lowe, 80 IBLA 101 (Apr. 3, 1984)

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

A state selecting indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for unsurveyed school sections within a national forest shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of secs. 16 and 36 therein. Where a protraction on which the state relies to make its indemnity selections reveals that a fractional township is present, the state's entitlement to indemnity lands is calculated according to the pro rata rule set forth at 43 U.S.C. § 852 (1976).

Where a survey on which the state relies to make its indemnity selections pursuant to the Act of Feb. 28, 1891, reveals a fractional township with a school section in place, the state's entitlement should be in an amount equal to the acreage shown by the surveyed school section or in an amount determined by the pro rata rule at the election of the state.

Until a survey of public lands has been run and approved, the designated sections of a township are undefined and the lands are unidentified.

State of Oregon et al., II, 80 IBLA 354 (May 10, 1984)
91 I.D. 212

Generally, the meander line of a river is not to be treated as a boundary and when the United States conveys a tract of land by patent referring to an official plat which shows the tract to be riparian to a river, the patent conveys all the rights to the water line of that river, if navigable, or to the center of the stream if nonnavigable, except where there is fraud, gross error shown in the survey, or an intention to limit a grant or conveyance to the actual meander lines as disclosed in the facts or circumstances.

Donald W. Hoar, 81 IBLA 74 (May 23, 1984)

AUTHORITY TO MAKE

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. He also has the authority to extend or correct the surveys of public lands as may be necessary.

Jean Ell, 78 IBLA 374 (Jan. 30, 1984)

DEPENDENT RESURVEYS

The dependent resurvey is designed to restore the original conditions of the official survey according to the record. It is based, first, upon identified corners and other acceptable points of control, and second, upon the restoration of lost corners by proportionate measurement in harmony with the record of the original survey. Corners established by the original survey should be located, if possible, by considering all the relevant evidence and not simply one or two factors. The rules for the restoration of lost corners should

SURVEYS OF PUBLIC LANDS--Continued

DEPENDENT RESURVEYS--Continued

not be applied until all available original and collateral evidence has been developed.

In an appeal from a timely protest to the acceptance of a dependent resurvey, the protestant has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. Failure to meet that burden will result in the affirmation of the decision dismissing the protest.

Ivan Ell, 78 IBLA 374 (Jan. 30, 1984)

An appellant challenging a Government resurvey has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

Robert W. Caldwell, 79 IBLA 141 (Feb. 22, 1984)

TAR SANDS

BLM has no authority under the Mineral Leasing Act as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 226(b) (1982), to issue a noncompetitive oil and gas lease for land within a designated tar sand area. A noncompetitive lease improvidently issued after the enactment of the amendment in violation of its requirements is properly canceled upon discovery of the error.

Dorothy Langley, 81 IBLA 349 (June 25, 1984)

TAYLOR GRAZING ACT

GENERALLY

A decision by BLM reducing authorized livestock grazing use pursuant to 43 CFR 4110.3-2(b) in order to facilitate achieving multiple-use management objectives, viz., allocating available forage to a competing antelope herd in the interest of promoting hunting and future transplanting, will not be disturbed absent substantial evidence showing that the decision is improper.

Charles Blackburn et al., 80 IBLA 42 (Mar. 28, 1984)

TIMBER SALES AND DISPOSALS

A BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed in the absence of a showing that the decision is clearly in error.

An appellant who levels specific criticisms of a BLM decision to proceed with a timber sale in an attempt to overturn the sale as being poorly planned and ill-conceived cannot prevail where the record shows that BLM complied with applicable law and procedures in offering the tract for sale and where many of the concerns and criticisms amount to mere expressions of disagreement with BLM's conclusions. An appellant's judgment cannot be substituted for that of BLM on the basis of arguable differences of opinion.

Robert G. Salisbury, 79 IBLA 370 (Mar. 26, 1984)

TIMBER SALES AND DISPOSALS--Continued

A decision by BLM denying a protest to a proposed timber sale will be affirmed where the appellant does not present sufficient evidence that the sale area was misclassified as high-intensity land.

Where BLM removes concentrated unplantable zones from the area of a proposed timber sale, that area is not misclassified as high-intensity land even though small unplantable zones are interspersed throughout it.

In re Chapman-Keeler Timber Sale, 80 IBLA 237 (Apr. 30, 1984)

A decision by BLM denying a protest to a proposed timber sale will be affirmed where the appellant does not present sufficient evidence that the sale area was misclassified as high-intensity land.

BLM may deviate from provisions contained in an environmental impact statement with respect to regeneration cutting in a planned timber sale where the deviation is not so significant as to require preparation of a supplemental environmental impact statement.

BLM may properly proceed with a proposed timber sale where the environmental assessment of the sale considered all relevant factors, including the impact of road construction on soil erosion, wildlife and recreational resources.

In re Bald Point Timber Sale, 80 IBLA 304 (May 4, 1984)

In reviewing a denial by the BLM of a protest of a timber sale on lands managed pursuant to the Act of Aug. 28, 1937 (O & C Act), 43 U.S.C. § 1181a (1982), on the issue of violation of the principle of "sustained yield," the Board will defer to BLM's judgment in the absence of a clear showing of failure to consider critical factors or that the timber sale is not supported by the administrative record.

In determining regeneration for purposes of high-intensity timber management land, the term "stocked" referring to the number of suitable trees per acre is properly distinguished from "established" referring to a stand of suitable growing trees which have survived at least one growing season.

In re Thompson Creek Timber Sale, 81 IBLA 242 (June 7, 1984)

A BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed absent a showing that the decision is clearly erroneous.

A party challenging a decision to harvest timber on the grounds that clearcutting is an inappropriate method to be employed and that pertinent environmental considerations were disregarded bears the burden of establishing both the factual predicates and the ultimate conclusions.

Curtin Mitchell & STAND, 82 IBLA 275 (Aug. 31, 1984)

TITLE

GENERALLY

While it is a general rule that adverse possession does not run against a state, this rule does not apply as against the United States. Where the United States has maintained open and notorious possession of certain parcels of land for over 80 years, the United States has acquired title to those parcels through adverse

TITLE--Continued

GENERALLY--Continued

possession even though the record title holder was a state.

State of Oregon et al., I, 78 IBLA 255 (Jan. 10, 1984)
91 I.D. 14

TRESPASS

GENERALLY

R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal law. By the time of the R.S. 2477 Idaho grant, Congress had already determined that telephone cables were not within the scope of an R.S. 2477 highway right-of-way. Thus, a telephone cable buried along an R.S. 2477 highway with a right-of-way from the State of Idaho but without the requisite BLM right-of-way is in trespass.

Mountain Bell, 83 IBLA 67 (Sept. 26, 1984)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

ADMINISTRATIVE REVIEW AND APPEALS

Payments for acquired property and relocation assistance benefits are separate and distinct entitlements, and assertions by claimants as to promises or misrepresentations concerning allowable benefits made by Bureau of Reclamation personnel in negotiations and acquisition of the real property by the United States, are not a basis for entitlement to benefits or administrative relief by this Department.

Uniform Relocation Assistance Appeal of Boyd F. & Raymond T. Henry (Messrs.), 5 OHA 325 (May 18, 1984)

UNIFORM REAL PROPERTY ACQUISITION POLICY

Expenses Incidental to Transfer of Title to the United States

Expenses incidental to transfer of title to the United States, reimbursable under sec. 101 of the Act and implementing regulations, do not include additional real estate taxes incurred by the grantor of the acquired property because of the disqualification of that land from a special use assessment.

Uniform Relocation Assistance Appeal of Juanita E. O'Rourke, 5 OHA 300 (Apr. 16, 1984)

Expenses incidental to transfer of title to the United States, reimbursable under 42 U.S.C. § 4653 (1982), and implementing regulations, do not include increased interest costs on loans affecting mortgaged property not conveyed to the United States, costs for travel and various title company charges involved in preparing and obtaining documents.

Uniform Relocation Assistance Appeal of Hugo W. Schoellkopf III (Ex. & Mrs.), 5 OHA 342 (July 31, 1984)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE

Generally

Only displaced persons under the Act are entitled to moving expenses and tenants by sufferance are not displaced persons.

Uniform Relocation Assistance Appeal of Don Fraser, Kenneth Theis, James Brown, & Patrick Baxter, 5 OHA 245 (Jan. 27, 1984)

A claim for reimbursement of expenses incurred for extension of an electric powerline across the portion of a tract of real property not acquired by the United States, to a site on that property to which the claimants relocated a hunting cabin formerly on the Government-acquired portion of the property, is properly disallowed on the basis that the Act and the implementing regulations do not provide for such payment.

To the extent any information given by Bureau personnel may have suggested to claimants that relocation assistance benefits would be allowable for expenses incurred in extending an electric powerline across the portion of real property not acquired by the United States, to a site on that property to which the claimants relocated a hunting cabin formerly on the Government-acquired portion of the property, such advice was erroneous and cannot serve as a basis for creating any rights in the claimants which are not authorized by law.

Uniform Relocation Assistance Appeal of Boyd F. & Raymond T. Henry (Messrs.), 5 OHA 325 (May 18, 1984)

Moving and Related Expenses

Generally

Where the Government does not show that a person's business was unlawful at the time it was conducted, the person may claim relocation benefits for personal property generated by that business.

Rock severed from the ground it is a part of becomes personal property for which a claim may be allowed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Forrest L. Hakeem, 5 OHA 232 (Jan. 12, 1984)

Only displaced persons under the Act are entitled to benefits. Only one whose property has been acquired or received a written order to vacate is a displaced person.

Uniform Relocation Assistance Appeal of Katherine A. Fiske et al., 5 OHA 263 (Feb. 8, 1984)

A tenant who moves before being ordered to do so is not a displaced person under the Act and only displaced persons are entitled to relocation benefits.

Uniform Relocation Assistance Appeal of Theodore L. & Leona L. Jans, 5 OHA 293 (Mar. 21, 1984)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Generally--Continued

Where an advertising sign was moved from the acquired land by the claimant in a self-move, the claimant is entitled to payment for the actual reasonable moving costs but not more than the estimated costs of moving the sign by a commercial mover.

Uniform Relocation Assistance Appeal of Cliff Park, Inc., 5 OHA 296 (Apr. 10, 1984)

Moving Expense Allowance

Generally

Where the record shows the residence on the acquired lands was a part-time residence and not the permanent or customary and usual abode of the claimants, the claimants are not qualified to receive a moving expense allowance and a dislocation allowance under sec. 202(b) of the Act in lieu of actual reasonable moving and related expenses authorized by sec. 202(a) of the Act.

Uniform Relocation Assistance Appeals of Marvin E. Hepner & Ruth Hepner, 5 OHA 270 (Feb. 29, 1984)

Payments in Lieu of Moving and Related Expenses

Fixed Payments

Taking of Business Operation

A claim for a fixed payment under sec. 202(c) of the Act for displacement from a business, in lieu of actual reasonable moving and related expenses under sec. 202(a) of the Act, is properly disallowed where the claimants fail to establish that the business cannot be relocated without a substantial loss of its existing patronage.

Uniform Relocation Assistance Appeals of Marvin E. Hepner & Ruth Hepner, 5 OHA 270 (Feb. 29, 1984)

Replacement Housing Payment for Homeowners

Generally

Where a Federal agency has determined that the former owner of an acquired property was not a full-time resident of the property previous to its acquisition, the burden of proof is on the owner to refute that determination.

Where the occupancy of a dwelling previous to its Federal acquisition is in dispute, substantial weight must be given to utility records and to their interpretation by a competent, impartial source, such as the local power company, that clearly support a contention by the claimant of full-time occupancy of the property during the period in question.

Uniform Relocation Assistance Appeal of Miriam Kimmel, 5 OHA 251 (Feb. 8, 1984)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners--Continued

Generally--Continued

Where the record shows the dwelling on the acquired lands was a part-time residence and not the permanent or customary and usual abode of the claimants, the claimants are ineligible to receive replacement housing payment benefits under sec. 203 of the Act.

Uniform Relocation Assistance Appeals of Marvin E. Hepner & Ruth Hepner, 5 OHA 270 (Feb. 29, 1984)

Replacement Housing Payment for Tenants and Certain Others

Replacement housing payment benefits under § 204(2) of the Act and the Department's regulations are properly denied where the record shows the claimants purchased their replacement dwelling more than 8 years prior to their displacement from the Government-acquired property.

Uniform Relocation Assistance Appeal of William G. Pitman (Mrs. E Resal, 5 OHA 333 (June 7, 1984)

WAIVER

In Lower v. Watt, 684 F.2d 957 (D.C. Cir. 1982), and Covey v. Watt, 720 F.2d 626 (10th Cir. 1983), the amendment and disclaimer of Fred L. Engle, d.b.a. Resource Service Co. was held to be effective to waive the exclusive agency provision that formed part of the company's contract with its clients. The waiver being effective, neither the company nor Engle possessed an interest in a client's offer at the time of a drawing of simultaneously filed oil and gas lease offers so as to invalidate the offer.

Michigan Wisconsin Pipeline Co. (On Reconsideration), Geosearch, Inc., John A. Kochergen, 80 IBLA 317 (May 7, 1984)

WATER AND WATER RIGHTS

GENERALLY

The Executive Order of Apr. 17, 1926, reserved the minimum amount of water necessary in springs and waterholes to provide water for the purposes of human and animal consumption. The entire flow of these water sources was not necessarily reserved.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

STATE LAWS

The right to use water from reserved springs and waterholes for any purpose other than the purposes of human and animal consumption must be obtained pursuant to applicable state law.

Desert Survivors, 80 IBLA 111 (Apr. 3, 1984)

WILD FREE-ROAMING HORSES AND BURROS ACT

BLM may properly take immediate possession of wild free-roaming horses, in accordance with 43 CFR 4740.4-3(e), where there is sufficient evidence in terms of the physical condition of the animals and the credible reports of third parties that the animals are being inhumanely treated, i.e., that they lack necessary food and shelter, have failed to receive medical treatment, and are subject to substandard animal husbandry practices.

Kathryn E. Spring, 82 IBLA 26 (July 5, 1984)

WILDERNESS ACT

An appellant seeking reversal of a decision denying a protest against issuance of a right-of-way across land in a wilderness study area to state-owned land must show that the decision was premised either on a clear error of law or a demonstrable error of fact. Where state land is encircled by Federal land within a wilderness study area, the state's lessee has a right of access across Federal land pursuant to 16 U.S.C. § 1210(b) (Supp. V 1981) adequate to secure the reasonable use and enjoyment of the leasehold. Because the BLM may not deny such access by requiring the lessee to use helicopters, BLM need not examine the feasibility of helicopter access in its consideration of a right-of-way application.

Utah Wilderness Ass'n, 80 IBLA 64 (Mar. 30, 1984)
91 I.D. 165

Where application is made for suspension of unitized oil and gas leases in order to preserve them from expiration pending approval of an application for permission to drill, and where the suspension is granted at the discretion of the authorized officer on condition that permission to drill may be denied upon a finding that drilling operations would result in unacceptable impacts on the wilderness characteristics of the area, an environmental impact statement on the effects of such drilling which fails to consider the alternative of refusing permission to drill is an inadequate basis for a decision to permit drilling.

Sierra Club et al. (On Judicial Remand), 80 IBLA 251 (May 2, 1984)

Organic Act Directive 78-61, Change 3, at page 3, provides that BLM may in certain instances properly adjust the boundary of an inventory unit based on the outstanding opportunity criterion.

In evaluating a unit's opportunity for solitude, BLM is directed by the Wilderness Inventory Handbook to consider factors which influence solitude only as they affect a person's opportunity to avoid the sights, sounds, and evidence of other people in the inventory unit. Factors or elements influencing solitude may include size, natural screening, and the ability of the user to find a secluded spot.

In assessing the presence or absence of wilderness characteristics in an inventory unit, the Bureau of Land Management necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal, and such judgments may not be overcome by expressions of simple disagreement.

The Wilderness Society et al., 81 IBLA 181 (June 1, 1984)

WILDLIFE REFUGES AND PROJECTS

ENVIRONMENTAL IMPACT STATEMENTS

The 1984 Continuing Resolution (98 Stat. 151) provides, at sec. 137, that no funds shall be used to process or grant oil and gas lease applications or offers on any Federal lands, outside Alaska, that are units of the National Wildlife Refuge System, except where there are valid existing rights or where the lands are subject to drainage, unless and until the Secretary of the Interior promulgates revisions to the existing regulations so as to explicitly authorize the leasing of such lands; holds a public hearing with respect to such revision; and prepares an environmental impact statement with respect thereto. All action upon affected oil and gas lease applications or offers filed before Nov. 14, 1983, is properly suspended until completion of the necessary steps.

TXO Production Corp., 79 IBLA 81 (Feb. 16, 1984)

LEASES AND PERMITS

The 1984 Continuing Resolution (98 Stat. 151) provides, at sec. 137, that no funds shall be used to process or grant oil and gas lease applications or offers on any Federal lands, outside Alaska, that are units of the National Wildlife Refuge System, except where there are valid existing rights or where the lands are subject to drainage, unless and until the Secretary of the Interior promulgates revisions to the existing regulations so as to explicitly authorize the leasing of such lands; holds a public hearing with respect to such revision; and prepares an environmental impact statement with respect thereto. All action upon affected oil and gas lease applications or offers filed before Nov. 14, 1983, is properly suspended until completion of the necessary steps.

TXO Production Corp., 79 IBLA 81 (Feb. 16, 1984)

Hingeline Overthrust Oil & Gas, Inc., 80 IBLA 4 (Mar. 27, 1984)

BLM properly rejects a noncompetitive oil and gas lease offer under 43 CFR 3101.3-1(b) (1982) for land within the Columbia National Wildlife Refuge, which was withdrawn for the protection of all species of wildlife.

D. M. Yates, 80 IBLA 140 (Apr. 6, 1984)

Land within the Columbia National Wildlife Refuge, established by Public Land Order No. 243, qualifies as "wildlife refuge land" and, thus, is subject to the prohibition on oil and gas leasing under 43 CFR 3101.5-1(b) (1983). A noncompetitive oil and gas lease for such land is properly rejected pursuant to the regulation.

D. M. Yates, 81 IBLA 160 (May 31, 1984)

BLM properly rejects a noncompetitive oil and gas lease offer under 43 CFR 3101.3-3(a) (1982) for land within the Columbia National Wildlife Refuge, which was withdrawn for the protection of all species of wildlife.

Inasmuch as coordination lands are properly deemed to be units of the National Wildlife Refuge System, oil and gas lease offers for such lands may not be granted, unless drainage is occurring, until such time as the Secretary of the Interior promulgates new regulations in conformity with sec. 137 of the 1984 Continuing Resolution, 97 Stat. 981.

D. M. Yates, 82 IBLA 389 (Sept. 13, 1984)

WITHDRAWALS AND RESERVATIONS

GENERALLY

Notation of a withdrawal application filed before Oct. 21, 1976, temporarily segregates the land from mineral location to the extent that the withdrawal, if effected, would do so. Under current regulations, the lands described in the withdrawal application, filed before Oct. 21, 1976, and still outstanding, remain segregated from settlement, sale, location, or entry under the public land laws to the extent specified in the Federal Register notice until Oct. 20, 1991.

Marilyn Dutton Hansen, 79 IBLA 214 (Feb. 28, 1984)

Lloyd J. Meehan, 81 IBLA 239 (June 6, 1984)

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws, including the mining laws, to the extent specified in the notice.

A placer claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio.

John C. Woill, 80 IBLA 39 (Mar. 28, 1984)

AUTHORITY TO MAKE

The Secretary of the Interior has the authority to withdraw mineralized lands from mineral entry.

Anthony Dunkiewicz, 79 IBLA 267 (Mar. 7, 1984)

EFFECT OF

A placer mining claim located for gold on land previously withdrawn from appropriation under the mining laws relating to metalliferous minerals by Public Land Order No. 4522, dated Sept. 13, 1968, is null and void ab initio.

Charles W. Phillips, 78 IBLA 320 (Jan. 24, 1984)

A mining claim located at a time the land is withdrawn from appropriation by the Act of May 29, 1928, is null and void ab initio. It is immaterial whether future revocation of the withdrawal is being considered.

Samuel R. Spezzetta, 78 IBLA 343 (Jan. 24, 1984)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal in the official BLM records is null and void ab initio.

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and remanded for appropriate action.

Lamar & Christine Burnett, 78 IBLA 349 (Jan. 25, 1984)

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

The subsequent revocation of a withdrawal of onshore submerged lands by necessity returns withdrawn lands to status they enjoyed before withdrawal, i.e., "public lands."

State Selections of Onshore Lands Underlying Navigable Waters in the Geographic Area of Revoked Public Land Order #2, F-36949 (Aug. 22, 1983) 91 I.D. 67

Lands segregated on the public records by a Recreational and Public Purposes lease are not available for the location of mining claims, but a claimant may establish the exterior boundaries of a lode claim on land under a Recreation and Public Purposes lease, with the permission of the lessee, for the purpose of making end lines parallel so as to obtain extralateral rights to a vein or lode discovered on lands available for location.

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Santa Fe Mining, Inc., 79 IBLA 48 (Feb. 9, 1984)

Generally, unless the mineral leasing laws or a withdrawal or reservation order specifically provides otherwise, the lands withdrawn or reserved for a specific purpose are available for leasing under the mineral leasing laws, if issuance of a mineral lease would not be inconsistent with or interfere with the purpose for which the lands are withdrawn or reserved.

TXO Productich Corp., 79 IBLA 81 (Feb. 16, 1984)

Notation of a withdrawal application filed before Oct. 21, 1976, temporarily segregates the land from mineral location to the extent that the withdrawal, if effected, would do so. Under current regulations, the lands described in the withdrawal application, filed before Oct. 21, 1976, and still outstanding, remain segregated from settlement, sale, location, or entry under the public land laws to the extent specified in the Federal Register notice until Oct. 20, 1991.

A mining claim whose discovery is located on land segregated and closed to mineral entry by notation of receipt of an application for withdrawal is properly declared null and void ab initio.

Marilyn Dutton Hansen, 79 IBLA 214 (Feb. 28, 1984)

Lloyd J. Meehan, 81 IBLA 239 (June 6, 1984)

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Comstock Tunnel & Drainage Co., Sutro Tunnel Co., 79 IBLA 237 (Mar. 1, 1984)